CLERK'S COPY.

114

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1928

No. 622

GENERAL INSURANCE COMPANY OF AMERICA,
PETITIONER,

vs.

NORTHERN PACIFIC RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 10, 1929

CERTIORARI GRANTED FEBRUARY 25, 1929

(33,931)

(33,931)

SUPREME COURT OF THE UNITED STATES

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NAMES AND ADDRESSES OF COUNSEL.

Messrs. HOWE & GRAHAM, Attorneys for Appellant,

856 Stuart Building, Seattle, Washington.

C. H. WINDERS, Esquire, Attorney for Appellee,

909 L. C. Smith Building, Seattle, Washington. [1*]

UNITED STATES OF AMERICA.

In the United States District Court for the Western District of Washington, Northern Division.

No. 11,162.

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendant.

SUMMONS.

The President of the United States of America, GREETING: To the Above-named Defendant, Northern Pacific Railroad Company, a Corporation.

YOU ARE HEREBY REQUIRED to appear in the United States District Court, in and for the

*Page-number appearing at the foot of page of original certified Transcript of Record.

Western District of Washington, Northern Division, within twenty days after the day of service of this summons upon you, exclusive of the day of service, and answer the complaint of the above-named plaintiff, now on file in the office of the Clerk of said court, in the city of Seattle, a copy of which complaint has been delivered to you; and unless you so appear and answer, the plaintiff will apply to the Court for the relief demanded in said complaint.

WITNESS, the Honorable JEREMIAH NETERER, Judge of said court, this 6th day of December, in the year of our Lord one thousand nine hundred and twenty-six, and of our Independence the one hundred and fifty-first.

[Seal] ED. M. LAKIN,
Clerk.
By T. W. Egger,
Deputy Clerk.

HOWE & GRAHAM,
For Plaintiff. [2]

MARSHAL'S RETURN.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the within summons on the therein named Northern Pacific Railway Company, by handing to and leaving a true and correct copy thereof with A. G. Kinsman, General Agent Passenger Department,

personally, at Seattle, in said District, on the 6th day of December, A. D. 1926.

E. B. BENN,
U. S. Marshal.
By A. B. Miller,
Deputy.

Marshal's Fees: $2.06.

[Endorsed]: Filed Dec. 7, 1926. [3]

In the United States District Court for the Western District of Washington, Northern Division.

No. 11,162.

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendant.

AMENDED COMPLAINT.

For a first cause of action against the defendant, plaintiff complains and alleges:

I.

That plaintiff, General Insurance Company of America, is, and at all times herein mentioned was, a corporation, duly organized and existing under and by virtue of the laws of the State of Washing-

ton, and engaged in the business of insuring property owners against loss by damage by fire, and that it has paid its current annual license fee as required by law.

II.

That the Northern Pacific Railway Company is, and at all times herein mentioned was, a corporation, duly organized under the laws of the State of Wisconsin, and engaged in operating a railroad in and through the Station of Badger, County of Benton, and State of Washington.

III.

That on the 22d day of February, 1926, in consideration of a yearly premium to it paid, the plaintiff executed and issued to one Peter Agor, a citizen and resident of the State of Washington, hereinafter called "Insured," a policy of insurance [4] numbered Wn. 508520, insuring said "Insured" in the sum of $12,000.00 against loss or damage by fire to wool and sacks, while contained in a certain warehouse situated at Badger Station, Benton County, Washington, all the property of said "Insured" when said policy was issued, and located in said warehouse building.

IV.

That on the 2d and 3d days of May, 1926, and while said policy of insurance was in full force and effect, the said wool and sacks, then of a value of $10,240.95, were totally destroyed by fire which said fire was negligently started by defendant, in the manner hereinafter alleged, on the 2d day of

May, 1926, at about the hour of 9:50 o'clock P. M. by sparks, cinders or live coals from a locomotive owned and then and there operated by the defendant, Northern Pacific Railway Company, a corporation, on its said railroad, to the damage of said "Insured" in the sum of $10,240.95; that said locomotive was so negligently constructed and operated as to permit and cause sparks, cinders or live coals to escape therefrom and to start a fire which spread to said wool and sacks, stored in said warehouse hereinbefore mentioned.

V.

That by reason of said fire, plaintiff became liable under said policy of insurance to pay, and did on the 14th day of May, 1926, pay to the said "Insured" the loss resulting therefrom, to wit, the sum of $10,240.95.

VI.

That said policy hereinabove referred to contained a provision to the effect that said General Insurance Company of America, a corporation, shall on payment of any loss be subrogated to the extent of such payment in the event that the fire was [5] caused by the act or neglect of any person or corporation to all right of recovery by the "Insured" for the loss resulting therefrom. That by reason of the said payment plaintiff became subrogated to all of the rights of said "Insured" against said defendant Northern Pacific Railway Company, a corporation, arising from said fire and damage to the full extent of said payment and contemporaneously with making said payment plain-

tiff received from said "Insured" a certain assignment and subrogation receipt in words and figures as follows, to wit:

"SUBROGATION RECEIPT.

Received of the General Insurance Company of America, of Seattle, Washington, by the hand of R. W. Dent Insurance Agency, Agent at Yakima, Washington, the sum of Ten Thousand Two Hundred Forty and 95/100 Dollars being in full of all claims and demands for loss and damage by fire on the 3rd day of May, 1926, to the property insured by Policy No. Wn. 508520 issued at the Yakima, Washington Agency of said Company, and in consideration of such payment the undersigned hereby assigns and transfers to the said Company each and all claims and demands against any person, persons, corporation, or property, arising from or connected with such loss or damage (and the said company is subrogated in the place of and to the claims and demands of the undersigned against said person, persons, corporation or property in the premises) to the extent of the amount above named.

Dated this 14th day of May, 1926, at Yakima, Wash.

PETER AGOR. (Signed.)

Witness: R. W. DENT. (Signed.)"

For a second cause of action against defendant, plaintiff complains and alleges:

I.

That plaintiff General Insurance Company of

America is, and at all time herein mentioned was, a corporation, duly organized and existing under and by virtue of the laws of the State of Washington, and engaged in the business of insuring [6] property owners against loss by damage by fire, and that it has paid its current annual license fee as required by law.

II.

That the Northern Pacific Railway Company is, and at all times herein mentioned was, a corporation, duly organized under the laws of the State of Wisconsin, and engaged in operating a railroad in and through the Station of Badger, County of Benton, State of Washington.

III.

That on the 22d day of February, 1926, in consideration of a yearly premium to it paid, the plaintiff executed and issued to one Peter Agor, a citizen and resident of the State of Washington, hereinafter called "Insured," a policy of insurance numbered Wn. 508679, insuring said "Insured," in the sum of $12,000.00 against loss or damage by fire to wool and sacks, while contained in a certain warehouse situated at Badger Station, Benton County, Washington, all the property of said "Insured" when said policy was issued and located in said warehouse building.

IV.

That on the 2d and 3d days of May, 1926, and while said policy of insurance was in full force and effect, the said wool and sacks, then of a value

of $10,240.95, were totally destroyed by fire which said fire was negligently started by defendant, in the manner hereinafter alleged, on the 2d day of May, 1926, at about the hour of 9:50 o'clock P. M., by sparks, cinders or live coals from a locomotive owned and then and there operated by the defendant, Northern Pacific Railway Company, a corporation, on its said railroad, to the damage of said "Insured" in the sum of $10,240.95; that said locomotive was so negligently constructed and operated as to permit and cause sparks, cinders or live coals [7] to escape therefrom and to start a fire which spread to said wool and sacks, stored in said warehouse hereinbefore mentioned.

V.

That by reason of said fire plaintiff became liable under said policy of insurance to pay, and did on the 14th day of May, 1926, pay to the said "Insured" the loss resulting therefrom to wit, the sum of $10,240.95.

VI.

That said policy hereinafter referred to contained a provision to the effect that said General Insurance Company of America, a corporation, shall on payment of any loss be subrogated to the extent of such payment in the event that the fire was caused by the act or neglect of any person or corporation, to all right of recovery by the "Insured" for the loss resulting therefrom. That by reason of the said payment plaintiff became subrogated to all of the rights of said "Insured" against said defendant Northern Pacific Railway

Company, a corporation, arising from said fire and damage to the full extent of said payment and contemporaneously with making said payment plaintiff received from said "Insured" a certain assignment and subrogation receipt in words and figures as follows, to wit:

"SUBROGATION RECEIPT.

Received of the General Insurance Company of America, of Seattle, Washington, by the hand of R. W. Dent Insurance Agency, Agent at Yakima, Washington, the sum of Ten Thousand Two Hundred Forty and 95/100 Dollars, being in full of all claims and demands for loss and damage by fire on the 3rd day of May, 1926, to the property insured by Policy No. Wn. 508679 issued at the Yakima, Washington Agency of said company, and in consideration of such payment the undersigned hereby assigns and transfers to the said company each and all claims and demands against any person, persons, corporation or property, arising from or connected with such loss or damage, (and the Company is subrogated in the place of and to the claims and demands of the undersigned against said person, persons, corporation or property in the premises) to the extent of the amount above named.

Dated this 14th day of May, 1926, at Yakima, Wash. [8]

PETER AGOR. (Signed.)

Witness: R. W. DENT." (Signed.)

WHEREFORE, plaintiff prays for judgment against said Northern Pacific Railway Company, a corporation, in the amount of Ten Thousand Two Hundred Forty and 95/100 Dollars ($10,240.95) on its first cause of action, and in the amount of Ten Thousand Two Hundred Forty and 95/100 Dollars ($10,240.95) on its second cause of action, or a total of Twenty Thousand Four Hundred Eighty-one and 90/100 Dollars ($20,481.90), together with interest thereon at the rate of six per cent (6%) per annum from May 14th, 1926, together with the costs of suit, and for such other relief as may be proper.

HOWE & GRAHAM,
Attorneys for Plaintiff.

State of Washington,
County of King,—ss.

H. K. Dent, being first duly sworn, on oath deposes and says: That he is President of General Insurance Company of America, a corporation, plaintiff herein; that he makes this verification on behalf of said plaintiff; that he has read the foregoing complaint; knows the contents thereof and believes the same to be true.

H. K. DENT.

Subscribed and sworn to before me this 8th day of October, 1927.

[Seal] FELIX F. KURZ,
Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Filed Oct. 10, 1927. [9]

[Title of Court and Cause.]

ANSWER.

Comes now the defendant and for answer to the complaint of the plaintiff, denies, admits and alleges as follows, to wit.

I.

Denies that it has any information sufficient upon which to base a belief as to the allegations set forth in Paragraph III of the first cause of action in said complaint, and consequently denies the same.

II.

Denies each and every allegation in Paragraph IV of the first cause of action in said complaint, and the whole thereof, excepting that it admits on information and belief that certain wool belonging to one, Peter Agor, in a warehouse at Badger Station, Wash., was destroyed by fire about the time therein alleged. [10]

III.

Denies that it has any knowledge or information sufficient upon which to base a belief as to the allegations contained and set forth in Paragraphs V and VI of said first cause of action in said complaint, and consequently denies the same and the whole thereof.

IV.

Denies that it has any knowledge or information sufficient upon which to base a belief as to the

allegations contained in Paragraph III of the second cause of action set forth in said complaint, and consequently denies the same.

V.

Denies each and every of the allegations alleged and set forth in Paragraph IV of the second cause of action in said complaint, and the whole thereof, excepting only that it admits upon information and belief that certain wool and sacks in a warehouse at Badger Station, Wash., were destroyed by fire at about the time referred to therein.

VI.

Denies that it has any information sufficient upon which to base a belief as to the allegations contained in Paragraphs V and VI of the second cause of action in said complaint, and consequently denies the same.

VII.

Denies further that plaintiff has been damaged in the sum of $10,240.95 on account of the first cause of action, and in the sum of $10,240.95 on account of the second cause of action, or a total of $20,481.90 and interest as alleged [11] in said complaint, or in any other sum, or in any other amount, or at all.

WHEREFORE this defendant having fully answered prays that this action be dismissed, and that it may go hence without day and have and recover of and from the plaintiff its costs and disbursements herein to be taxed, and such other and further relief as to the Court may seem meet

and equitable and consistent with the proofs upon a hearing hereon.

GEO. T. REID,
C. H. WINDERS,
Attorneys for Defendant.

United States of America,
District of Washington,—ss.

C. H. Winders, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the defendant and makes this verification on its behalf, being authorized so to do, said defendant being a foreign corporation; that he has read the foregoing answer, knows the contents thereof, and believes the same to be true.

C. H. WINDERS.

Subscribed and sworn to before me Dec. 28, 1926.

[Seal] BRUCE JENNINGS,
Notary Public in and for the State of Washington, Residing at Seattle. [12]

[Endorsed]: Received a copy of the foregoing answer this 29th day of December, 1926.

HOWE & GRAHAM,
Attorneys for Pltff.

[Endorsed]: Filed Dec. 29, 1926. [13]

[Title of Court and Cause.]

STIPULATION THAT ANSWER TO COMPLAINT MAY BE CONSIDERED AS ANSWER TO AMENDED COMPLAINT.

It is hereby stipulated by and between the parties hereto that plaintiff may file its amended complaint and that defendant's answer, heretofore served and filed, may apply and be considered as the answer of defendant to said amended complaint.

Dated at Seattle, Washington, this 8th day of October, 1927.

HOWE & GRAHAM,

Attorneys for General Insurance Company of America, a Corporation.

GEO. T. REID,

C. H. WINDERS,

Attorneys for Northern Pacific Railway Company, a Corporation.

[Endorsed]: Filed Oct. 10, 1927. [14]

[Title of Court and Cause.]

ORDER ALLOWING FILING OF AMENDED COMPLAINT.

Now on this 10th day of October, 1927, upon stipulation of the parties hereto, an order is entered allowing the filing of an amended complaint.

Journal No. 15, page 491. [15]

[Title of Court and Cause.]

TRIAL.

Now, on this 4th day of November, 1927, this cause comes on for trial, Howe and Graham appearing for the plaintiff and C. H. Winders appearing for the defendant. Both sides are ready. A jury is impaneled and sworn as follows: Ray W. Clough, Fred Fourtner, Charles J. Leclair, Fred Miller, Carlos D. Bradley, W. E. Barker, C. W. Croasdill, Jr., Richard G. Bushell, P. H. Price, W. J. Brounty, Elsie M. Knapp, and LeRoy E. Scofield. The counsel for the plaintiff makes the opening statement to the jury, the counsel for the defendant reserving an opening statement. The witnesses for the plaintiff are sworn and examined as follows: H. Fernandez, Hugh Palmer, B. Agor, and R. W. Dent. The plaintiff's exhibits numbered 1 to 5, inclusive, are admitted in evidence. The defendant's exhibit numbered "A–1" is admitted in evidence. The plaintiff rests. The counsel for the defendant moves for a nonsuit. The jury is excused until 2 o'clock P. M. The motion is argued and granted, an exception is noted. At 2 o'clock P. M., the jury is discharged from the case and judgment of dismissal is signed.

Journal No. 15, page 604. [16]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 11,162.

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,

Plaintiff,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Defendant.

JUDGMENT.

BE IT REMEMBERED that this cause came on duly and regularly for trial on the 4th day of November, 1927, having been regularly continued from time to time from the 27th day of October, 1927, the plaintiff appearing by its attorneys, James B. Howe and Donald Graham, and the defendant appearing by its attorneys, Geo. T. Reid and C. H. Winders, and a jury having been duly and regularly impaneled and sworn to try said cause, and plaintiff having introduced its evidence and rested, and the defendant having interposed a motion for judgment of nonsuit, on the ground that the plaintiff had failed to show any facts sufficient upon which to justify the submission of the issues of the case to the jury, or to show negligence on the part of the defendant as alleged, or at all, and said motion having been duly presented

to the Court, and the Court being fully advised in the premises, grants the same and directs that this action be dismissed; [17]

WHEREFORE, IT IS HEREBY ORDERED that the motion for nonsuit interposed by the defendant be, and it is hereby, granted, and this action be, and it is hereby, dismissed, and that the defendant do have and recover of and from the plaintiff its costs and disbursements herein to be taxed; to all of which the plaintiff excepts and its exception is allowed.

Done in open court this 4th day of November, 1927.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed Nov. 4, 1927. [18]

[Title of Court and Cause.]

STATEMENT OF COSTS AND DISBURSEMENTS TO BE TAXED IN FAVOR OF THE DEFENDANT AND AGAINST THE PLAINTIFF.

				Taxed
Clerk's Costs			$10.00	5.00
Attorneys' Fees, statutory			20.00	20.00
Witness Fees:				
Theo. Peterson,	Pasco, Wash.	7 days 506 mi.	39.30	21.50
D. W. Kerr,	"	7 " 506 "	39.30	21.50
G. H. Hazzard,	"	7 " 506 "	39.30	21.50
Art. Salagianis,	Yakima, Wash.	7 " 326 "	30.30	21.50
Art. Partch,	Pasco, Wash.	7 " 506 "	39.30	21.50
Geo. Havanis,	Yakima, Wash.	7 " 326 "	30.30	21.50
Edw. Donnelly,	Pasco, Wash.	7 " 506 "	39.30	21.50
H. Hanson,	Spokane, Wash.	7 " 798 "	53.90	21.50
D. C. Putnam,	Pasco, Wash.	7 " 506 "	39.30	21.50

				Taxed
Jacob Jacobsen,	Pasco, Wash.	7 days, 506 mi	39.30	21.50
Stephen Fairfield,	"	7 " 506 "	39.30	21.50
Alfred Anderson,	"	7 " 506 "	39.30	21.50
N. J. Jacobs,	"	7 " 506 "	39.30	21.50
F. L. Preston,	Spokane, Wash.	7 " 798 "	53.90	21.50
W. R. Thompson,	Pasco, Wash.	7 " 506 "	39.30	21.50
M. E. Temple,	"	7 " 506 "	39.30	21.50
Hugh Palmer,	"	7 " 506 "	39.30	21.50
O. C. McDermett	"	7 " 506 "	39.30	21.50
[19]	Forwarded		$748.60	412.00
	Forwarded		$748.60	Taxed 412.00
Everett Young,	Pasco, Wash.	7 days, 506 mi.	39.30	21.50
S. George,	"	7 " 506 "	39.30	21.50
T. W. Balke,	"	7 " 506 "	39.30	21.50
B. O. Bucklin,	"	7 " 506 "	39.30	21.50

				Taxed
B. C. King,	St. Paul, Minn.	7 days, 826 mi (Wash. State Line)	53.30	21.50
V. Gamble,	Spokane, Wash.	7 " 798 mi.	53.90	21.50
A. W. Schroeder,	Pasco, Wash.	1 " 506 "	27.30	21.50
W. B. Norton,	Seattle, Wash.	7 " 2 "	14.20	14.10
Mr. Fisher,	"	7 " 2 "	14.20	14.10
Mr. Ryno,	"	7 " 2 "	14.20	14.10
	Total		$1,084.90	604.80

Taxed at $604.80 Nov. 14, 1927, and appeal taken therefrom *instanter* and same tentatively set for hearing Wednesday afternoon, Nov. 16, 1927.

ED. M. LAKIN,
Clerk.
By S. E. Leitch,
Deputy.

GEO. T. REID,
C. H. WINDERS,
Attorneys for Defendant.

Items of fees as to Hanson, Jacobs, Preston, Fisher & Ryno, stricken and disallowed by court order Jan. 26, 1928.

$604.80
92.70

Retaxed at $512.10
Jan. 26, 1928.

ED. M. LAKIN,
Clerk.
By S. M. H. Cook,
Deputy. [20]

United States of America,
District of Washington,—ss.

C. H. Winders, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the defendant, and as such had charge of the trial of this action on its behalf, and has full knowledge of the facts in connection with the taxation of the foregoing costs, and states the fact to be that the items set forth in the foregoing cost bill are correct, and

that the disbursements therein set forth have been necessarily incurred in this suit, and the several witnesses enumerated were in attendance in Seattle, as witnesses in the above-entitled action, from Thursday morning, October 27, 1927, up to and including Friday, November 4, 1927, and that each of said witnesses, with the exception of the witnesses Norton, Fisher and Ryno, reside at such a distance from Seattle as would prohibit their returning thereto from day to day.

Affiant further states the fact to be that the defendant was required to pay as fees to said witnesses for their attendance sums largely in excess of the statutory witness fees and mileage, as set forth in the foregoing cost bill.

C. H. WINDERS.

Subscribed and sworn to before me November 7, 1927.

[Seal] BRUCE JENNINGS,
Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Received a copy of the foregoing cost bill this 8th day of November, 1927.

HOWE & GRAHAM,
Attorneys for Ptff.

[Endorsed]: Filed Nov. 8, 1927. [21]

[Title of Court and Cause.]

OBJECTIONS OF PLAINTIFF TO DEFENDANT'S STATEMENT OF COSTS AND DISBURSEMENTS.

Comes now the plaintiff above named, General Insurance Company of America, a corporation, and objects to the items of costs and disbursements contained in defendant's statement as follows, to wit:

I.

Objects to having said statement of costs and disbursements taxed in any item whatsoever upon the ground that said statement is not supported by an affidavit, as required by Rule No. 70, Rules of United States District Court, for the District of Washington, and by Section No. 1625, Compiled Statutes of the United States, in that there is no statement or showing contained in the said statement, or the affidavit accompanying same, that the services charged therein had been actually and necessarily performed, as therein stated.

Without waiving the preceding objection, the plaintiff further objects: [22]

II.

Plaintiff objects to all the items in said statement covering witness fees and mileage upon the ground that there is no showing made in said statement, or the affidavit accompanying same, that the attendance of the witnesses mentioned therein was proper, as required by Rule No. 70, Section 7–a.

Rules of United States District Court for the District of Washington, and upon the additional ground that there is no showing that the testimony of any or all of said witnesses, if called for, would have been material or that their personal attendance was necessary in lieu of taking their depositions, and further on the ground that none of said witnesses testified on behalf of defendant.

III.

Objects to taxation or allowance of witness fees or mileage to any witness except Art Salagianis, George Havanas, W. R. Thompson, M. E. Temple, H. Palmer, B. C. Bucklin, S. George and T. W. Balke, on the ground that all other witnesses mentioned in said statement are not material witnesses and were unnecessarily present.

IV.

Objects to taxation of witness fees and mileage to more than three (3) witnesses present to testify as to any fact or issue.

V.

Objects to the allowance to any witness of witness fees in excess of one (1) day on the ground that none of said witnesses were in proper attendance for more than one (1) day, and upon the additional ground that the trial of the above-entitled cause was completed in one (1) day.

VI.

Objects to the allowance to any of said witnesses of [23] witness fees for the 29th, 30th and 31st of October on the ground that said witnesses were

not in proper attendance, or in any attendance whatsoever, in court upon said dates.

VII.

Objects to the taxation of mileage for any of the witnesses mentioned in said statement in the amounts as claimed, and to any mileage for any witness in excess of one hundred fifty (150) miles, upon the ground, as shown by said statement, that each of said witnesses—except the last three (3) listed in said statement—attended from eastern points without this District and that the distance from Seattle to the eastern boundary limit of this district along the route actually and necessarily traveled by each of said witnesses does not exceed seventy-five (75) miles, this being the maximum of mileage allowance as fixed by Rule No. 70, Section 7–b, Rules of the United States District Court for the District of Washington.

VIII.

Objects to the allowance of Clerk's costs in the sum of Ten Dollars ($10.00) on the ground that the docket fails to show the incurring of costs to the Clerk by defendant in excess of $5.00.

IX.

Objects to mileage allowance of witnesses Norton, Fisher and Ryno of more than ten cents (10¢) each.

Objections above made are supported by the affidavit of Donald G. Graham hereto attached.

HOWE & GRAHAM,
Attorneys for Plaintiff. [24]

United States of America,
District of Washington,—ss.

Donald G. Graham, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the plaintiff, General Insurance Company of America, a corporation, and makes this affidavit for and in behalf of said plaintiff; that he has had charge of the trial of this action on behalf of said plaintiff; that the distance from Seattle to the eastern boundary limit of the District of Washington along the line and route actually and necessarily traveled by the witnesses referred to in defendant's statement of costs is approximately seventy-five (75) miles; affiant further states that according to his information and belief all the witnesses mentioned in said statement—except Art Salagianis, George Havanas, W. R. Thompson, M. E. Temple, H. Palmer, B. C. Bucklin, S. George and T. W. Balke, were immaterial and unnecessary witnesses in that they could not have had any knowledge of facts, or be called upon to testify as to any material fact, in the trial; that the witnesses just referred to were the two (2) railroad employees residing and present at the scene of the fire and the other excepted witnesses were the train crew, including two engineers, two firemen, conductor and brakeman of the train that passed through Badger Station immediately before the fire; and affiant believes and therefore states that said witnesses were the only witnesses summoned by defendant who could offer material testimony in reference to the

issues raised by the pleadings; that counsel for defendant, C. H. Winders, stated to affiant that he had caused twenty (20) witnesses including two (2) full train crews to appear but that he did not intend to use them, but simply wanted them present to avoid any criticism in not having summoned them; that Counsel made substantially [25] the same statement in open court to the Honorable George Bourquin, Judge; that in any event the second train crew could have no knowledge of the facts or circumstances connected with the negligence of defendant or of the fire; affiant further states that plaintiff was ready to proceed to trial on October 27th, 1927, the date this case was set for trial and that its adjournment and continuance during the succeeding period was through no fault or through any request of plaintiff; that any witnesses of defendant, if present during the period stated in the affidavit accompanying defendant's statement, was not present more than a few minutes upon each day, to wit: October 27th, October 28th, November 1st, second and third, and that none of said witnesses were in attendance on October 29th, 30th and 31st, the Court having adjourned the case shortly after 10:00 A. M., on the morning of October 28th, to 10:00 A. M., November 1st, 1927; that on November 3d, 1927, counsel for defendant procured a resetting of said case before the Honorable Jeremiah Neterer, Judge, for November 4th, 1927, and that for said setting said witnesses of defendant were only in attendance one (1) day, to wit: November 4th, 1927. Affiant further states that

each and all of said witnesses mentioned in defendant's statement, except the three (3) witnesses residing in Seattle, were excused on Friday, October 28th, at about 10:00 A. M., and could have returned to their homes and there spent the intervening time until Tuesday morning, November 1st, 1927, and that affiant states on information and belief that each and all of said witnesses are employees of defendant corporation, and as such could have made said trip without incurring any expenses for railroad fares and that the distance said witnesses resided from Seattle would not, in fact, prohibit their returning to their homes during said interim. Affiant further states, on information and belief, that [26] defendant's statement lists a grossly excessive number of witnesses and an allowance of fees and mileage for all of said witnesses is an unreasonable burden upon plaintiff, particularly in view of the fact that counsel, by his own statement, did not intend to use all of said witnesses and was told by Judge Bourquin that he would not be allowed to use any such number of witnesses when he made the statement to Judge Bourquin in open court that he had twenty (20) witnesses attending and awaiting the trial.

DONALD G. GRAHAM.

Subscribed and sworn to before me this 10th day of November, 1927.

[Notarial Seal] LIONEL J. BOURKE,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed Nov. 11, 1927. [27]

[Title of Court and Cause.]

AFFIDAVIT OF C. H. WINDERS IN REPLY TO AFFIDAVIT OF DONALD G. GRAHAM AND IN SUPPORT OF COST BILL.

United States of America,
District of Washington.—ss.

C. H. Winders, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the defendant, and as such prepared and verified the original cost bill on file herein.

That engines 1616 and 1618, pulling a freight train, passed the scene of this fire between 9:40 and 9:50 P. M. on the night of the fire as set forth in the complaint, while the train passing said warehouse immediately prior thereto was a passenger train, NP. 333, which arrived at Kiona at 8:38 P. M. on the same day.

That the witnesses enumerated in the cost bill of the defendant were either members of the train crews of the double-header freight train, or on passenger train 333, or of the mechanical department who had inspected the two freight engines and one passenger engine. [28]

That Theo. Peterson was the conductor on engine 1618.

D. W. Kerr was road foreman of engines of the defendant on the Pasco Division, on which the fire complained of occurred, and as such had charge

of all engineers while out on the road. He is a man of many years' experience, familiar with the three engines which might have been drawn into this controversy, familiar with their construction and method of maintenance, and also with the records of the various enginemen on said engines.

G. H. Hazzard is the roundhouse foreman of this defendant at Pasco. He personally inspected both freight engines the morning after the fire.

Art. Salagianis was a section foreman of this defendant at Badger, and the first person who discovered the fire.

Art. Partch was a building and bridge inspector of the defendant, and was the defendant's representative sent to the scene of this fire the morning after the fire, and knows of existing conditions.

Geo. Havanis was a section laborer, who was present at the time of the fire.

Edw. Donnelly, Jacob Jacobsen, Stephen Fairfield and Alfred Anderson, were boiler makers and inspectors at Pasco and inspected the two freight engines in question, some of them one and some of them the other, prior to their leaving the roundhouse on the day of the fire and after the return of the engines to the roundhouse at Pasco. H. Hanson, mechanical inspector at Pasco, who inspected the engine pulling train 333. [29]

D. C. Putnam was dispatcher at Pasco. He received the first word of the fire and made the train sheet covering the movement of trains at the time of this fire, which train sheet the plaintiff asked the defendant to produce.

N. J. Jacobs was the engineer, between Pasco and Ellensburg, on the night of this fire on the engine pulling train 333.

F. L. Preston was conductor on train 333, which passed through Badger on the night of the fire.

W. R. Thompson was the engineer on the night of this fire on engine 1618.

M. E. Temple was the fireman on engine 1616.

Hugh Palmer was the fireman on engine 1618.

O. P. McDermett and Everett Young were both brakemen on the freight train pulled by engines 1616 and 1618.

S. George was the engineer on engine 1616.

T. W. Balke was a brakeman on the freight train pulled by engines 1616 and 1618.

B. O. Bucklin was the conductor on engine 1616.

B. C. King was general boiler and safety inspector of the Northern Pacific System. He made a large size model of an engine for the purpose of demonstrating the construction of the fire prevention devices thereon. He was called and retained for approximately two weeks, for the purpose of acting as an expert witness.

V. Gamble was a civil engineer. He prepared a plat showing the station at Badger Station, which was identified at the time of the trial. [30]

Mr. Fisher, a mechanical inspector, inspected the engine pulling train 333, which passed the scene of this fire the night of the fire, after it reached Seattle.

Mr. Ryno was the engineer who operated the engine of train 333 from Ellensburg to Seattle on the

same trip this train was operated on the night of the fire.

W. B. Norton is a retired safety inspector of the Northern Pacific System, employed for years in connection with federal inspectors; was master mechanic for years, is familiar with engine construction and fire prevention devices, and was retained as an expert.

A. W. Schroeder was the fireman on train 333, which passed through Badger on the night of the fire.

Each of the witnesses enumerated above, being brakemen, engineers, firemen, conductors or trainmen, were on engines 1618, 1616, or on the train being pulled by said engines, or on train 333, as the same passed through Badger on the night of the fire referred to in the plaintiff's complaint, and in the opinion of affiant each of said witnesses were material witnesses, and the defendant could not have safely proceeded with the trial of this case without their presence. That each of them knew of the method of operation of the engines and the trains in question, and as to conditions incident to the equipment being used, and as to the physical facts as they existed on the night of the fire referred to in the plaintiff's complaint.

That each of the employees of the mechanical department were, in the opinion of affiant, necessary and [31] material witnesses, they being the representatives of the defendant who examined the engines which passed the scene of this fire immediately prior thereto. That each one of said in-

spectors, excepting as to the two freight engines, examined only one thereof, either on its outward or inward trip, the two freight engines being examined by one of said witnesses on the night of the fire. That when the mechanical department was notified of the fire, both of said engines were thoroughly examined by the roundhouse foreman and three other mechanical boiler makers at Pasco.

That the other witnesses enumerated were, in the opinion of affiant, necessary and material witnesses, and that all of said witnesses were called to testify to material facts in connection with the defense of this action.

With reference to the affidavit of Donald G. Graham, wherein inference is made that this affiant stated that he did not intend to call all of said witnesses, affiant states the facts with reference thereto to be as follows, to wit:

That in preparing for the trial of this case, affiant felt it would be unsafe to go to trial without the presence of each and all of the witnesses enumerated in said cost bill, and who actually attended, as set forth therein.

That when this case was being continued from day to day, affiant set forth that he had in the neighborhood of thirty, not twenty, witnesses, and Judge Bourquin stated [32] it was doubtful if so many witnesses would be heard, and affiant stated that it might be that it would not be necessary to call all of such witnesses; and affiant made substantially the same statement to Judge Neterer, before whom this case was tried, stating that in a

fire case such as set forth in the complaint herein, the defendant could not tell accurately exactly what might be developed, and that it might be that some of the witnesses who were being held would not be called. Affiant made substantially the same statement to Donald G. Graham.

That the expense to the railway company in bringing each of said witnesses to the trial of this case greatly exceeded, in each instance, the amount that could in any event be taxed as costs.

Referring to such cost bill, affiant did not ask for any fees for Saturday, Sunday or Monday, referred to in said affidavit of Donald G. Graham, although the fact is that none of said witnesses were able to return to work, for the reason that by the time they reached their place of work they would not have sufficient time to go out with their respective crews.

That the mechanical men, other than those in Seattle, could not work, because they would not reach their place of work until Saturday, too late to go to work, and they were required to leave their place of work prior to the close of the workday on Monday. That notwithstanding such fact, affiant, on behalf of the defendant, did not claim costs for such three days. [33]

With reference to the crew on train 333, while that train went through Badger Station between 8 and 9 o'clock on the night of the fire, affiant had no means of knowing if an attempt would not be made to saddle some responsibility of such train, and it would seem to affiant utterly beyond physical

belief to believe that a fire, such as is referred to in plaintiff's complaint, could start in such a short time after the two freight engines passed, and as a matter of precaution he felt, from experience in trials of cases of this character, that he would be subject to very great criticism if such train crew was not available, although affiant intended, if plaintiff tied itself down definitely to the two freight engines, not to offer their evidence, but affiant had no assurance such would be the developments in the case.

C. H. WINDERS.

Subscribed and sworn to before me November 12, 1927.

[Seal] BRUCE JENNINGS,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed Nov. 12, 1927. [34]

[Title of Court and Cause.]

ORDER ON APPEAL FROM THE DECISION OF THE CLERK IN RE TAXATION AND COSTS.

Appeal being taken by plaintiff orally *instanter* on the 12th day of November, 1927, from the decisions of the Clerk of the District Court in and for the above-entitled Division and District and the hearing upon said appeal having been set over for argument to January 23, 1928, and argument being

had thereon upon said date, based upon plaintiff's objections to defendant's statement of costs and disbursements except objections numbered 7, 8, and 9, it appearing that all of said objections except objections 7, 8, and 9 were overruled and denied by said Clerk; and it appearing to the Court that witnesses H. Hansen, N. J. Jacobs, F. L. Preston, Fisher and Ryno were not material witnesses and were unnecessarily present, being employees of a train crew of a train which passed through Badger Station about 8:00 o'clock in the evening of the day of the fire. It is, therefore,

ORDERED, that plaintiff's objections to defendant's statement of costs and disbursements as taxed by the Clerk being numbered objections 1, 2, 3, 4, 5, and 6, be, and each of them are hereby, denied except that objection number three (3) is granted to the extent that the allowance of any witness fees or mileage to witnesses H. Hanson, N. J. Jacobs, F. L. Preston, Fisher and [35] Ryno is set aside and denied upon the grounds above stated and the Clerk of the District Court is directed to strike from the allowance and taxation of costs, heretofore made, the witnesses' fees and mileage of said five witnesses, and the remaining items of costs as taxed by the Clerk are approved, to all of which—except as to the striking of fees and mileage of said five witnesses—plaintiff excepts and its exceptions are hereby allowed.

Done in open court this 26 day of January, 1928.

JEREMIAH NETERER,

Judge.

O. K. as to form.

C. H. W.

HOWE & GRAHAM.

[Endorsed]: Filed Jan. 26, 1928. [36]

[Title of Court and Cause.]

PETITION FOR NEW TRIAL.

Comes now the plaintiff and respectfully petitions the Court for an order granting to it a new trial in the above-entitled cause for the following causes materially affecting the substantial rights of plaintiff, to wit:

I.

Irregularity in the proceedings of the Court and the entry of judgment and order of nonsuit by the Court and abuse of discretion by the Court by which plaintiff was prevented from having a fair trial.

II.

In sufficiency of the evidence to justify the order and judgment of nonsuit, to wit: Proof of facts and circumstances justifying an inference that the fire in question originated from defendant's locomotive, thus rendering the ground upon which nonsuit was granted untenable.

III.

Errors in law occurring at the trial, to wit: Refusal of the Court to allow interrogation by plaintiff of witness Dent in reference to admissions made by Salagianis, employee of defendant; [37] also in

granting motion of defendant for nonsuit and entry of order and judgment therefor.

This petition is based upon the pleadings and papers, including among others the exhibits, together with the minutes of the court and the reporter's transcript of testimony.

HOWE & GRAHAM,
Attorneys for Plaintiff.

United States of America,
District of Washington,—ss.

Donald G. Graham, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the plaintiff and makes this verification for and on behalf of plaintiff; that he has read the foregoing petition; knows the contents thereof and believes the same to be well founded and that same is not made for the purpose of delay.

DONALD G. GRAHAM.

Subscribed and sworn to before me this 15th day of November, 1927.

[Seal] LIONEL J. BOURKE,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Received copy of within and service acknowledged this 15 day of Nov., 1927.

C. H. WINDERS,
Attorney for Defendant.

[Endorsed]: Filed Nov. 16, 1927. [38]

[Title of Court and Cause.]

ORDER DENYING PETITION FOR NEW TRIAL.

The above-entitled cause coming on for hearing upon plaintiff's petition for a new trial on January 23, 1928, the parties being present in court by and through their respective counsel and argument being had thereon and the Court being fully advised in the premises, it is hereby,

ORDERED that plaintiff's petition for a new trial be, and it is hereby, denied, to all of which plaintiff excepts and its exceptions are allowed.

Done in open court this 26 day of January, 1928.

JEREMIAH NETERER,
Judge.

O. K.—C. H. W.
O. K. as to form.

HOWE & GRAHAM.

[Endorsed]: Filed Jan. 26, 1928. [39]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To Northern Pacific Railway Company, a Corporation, and C. H. Winders, Its Attorneys:

You, and each of you, are hereby notified that General Insurance Company of America, a corporation, plaintiff above named, by and through its attorneys, Howe & Graham, appeals from the judg-

ment made and entered in the District Court of the United States for the Western District of Washington, on November 4, 1927, and from each and every part thereof. Said appeal being to the United States Circuit Court of Appeals for the Ninth Circuit.

HOWE & GRAHAM,
Attorneys for Plaintiff.

[Endorsed]: Received a copy of the foregoing notice of appeal this 12th day of April, 1928.

C. H. WINDERS,
J.,
Attorneys for Defendant.

[Endorsed]: Filed Apr. 13, 1928. [40]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the plaintiff in the above-entitled cause and files the following assignment of errors, upon which it will rely upon its prosecution of the appeal in the above-entitled cause from the judgment made by this Honorable Court on the 4th day of November, 1927:

I.

The Court erred in granting motion of defendant for a nonsuit on November 4, 1928, to which ruling the plaintiff duly excepted, which error resulted in preventing the jury from considering and passing upon and deciding the issue of fact presented by

plaintiff's complaint and sustained by the witnesses testifying in favor of plaintiff, which said issue was whether the defendant, through its agents and servants negligently caused the fire which destroyed plaintiff's property; also upon the additional ground that the Court had no jurisdiction to grant said motion for a nonsuit. [41]

II.

The Court erred in entering judgment of nonsuit and dismissal on said 4th day of November, 1927, which error resulted in preventing the jury from considering and passing upon and deciding the issue of fact presented by plaintiff's complaint and sustained by the witnesses testifying in favor of plaintiff, which said issue was whether the defendant, through its agents and servants negligently caused the fire which destroyed plaintiff's property; also upon the additional ground that the Court had no jurisdiction to grant said motion for a nonsuit.

III.

The Court erred in entering order denying plaintiff's petition for a new trial on January 26, 1928, upon the grounds set forth in said petition.

IV.

The Court erred in sustaining objections to questions put to the witness R. W. Dent as to what admissions or statements were made by Salagianis, employee of defendant at the scene of the fire, in reference to how and when he first saw the fire; to the sustaining of which objections, an exception was duly taken by plaintiff.

V.

The Court erred in refusing to sustain plaintiff's objections numbered 1, 2, 4, 5 and 6, and a portion of objection numbered 3 to defendant's statement of costs and disbursements as taxed by the Clerk, upon the grounds set forth in said objections.

WHEREFORE, plaintiff prays that the judgment rendered and entered against it in this cause on November 4, 1927, in [42] favor of the defendant, may be reversed and set aside and a new trial granted to plaintiff.

HOWE & GRAHAM,
Attorneys for Plaintiff.

[Endorsed]: Filed Apr. 13, 1928. [43]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, General Insurance Company of America, as principal, and American Surety Company of New York, as sure*ties*, are held and firmly bound unto Northern Pacific Railway Company, a corporation, in the sum of One Thousand and no/100 ($1,000.00) Dollars, lawful money of the United States, to be paid to it, and its respective assignees or successors; to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, by these presents.

SEALED with our seals and dated this 12th day of April, 1928.

WHEREAS the above-named General Insurance Company of America, a corporation, has prosecuted an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse and correct the judgment of the District Court for the Western District of Washington, Northern Division, in the above-entitled cause: [44]

NOW, THEREFORE, the condition of this obligation is such that if the above-named General Insurance Company of America, a corporation, shall prosecute its said appeal to effect and answer all costs, if it fails to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

GENERAL INSURANCE COMPANY OF AMERICA.

By HOWE & GRAHAM,
Its Attorneys.

AMERICAN SURETY COMPANY OF NEW YORK.

By S. H. MELROSE,
Resident Vice-President.
E. F. KIDD, (Seal)
Resident Asst. Secretary.

The within bond is approved both as to sufficiency and form, this 13th day of April, 1928.

JEREMIAH NETERER,
United States District Judge.

[Endorsed]: Filed Apr. 13, 1928. [45]

[Title of Court and Cause.]

BILL OF EXCEPTIONS. [46]

[Title of Court and Cause.]

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[47—1]

[Title of Court and Cause.]

PROCEEDINGS HAD NOVEMBER 4, 1927.

BE IT REMEMBERED, that heretofore and on, to wit, November 4, 1927, at the hour of 10 o'clock A. M., the above-entitled cause came regularly on for trial in the above court, and before the Honorable Jeremiah Neterer, one of the Judges of said court, sitting with a jury.

The plaintiff appearing by James B. Howe, Esq., and Donald G. Graham, Esq., of Messrs. Howe & Graham, its attorneys and counsel.

The defendant appearing by C. H. Winders, Esq., its attorney and counsel.

WHEREUPON the jury having been duly empaneled and sworn, the following proceedings were had and done, to wit: [48—2]

Mr. GRAHAM.—May it please the Court and lady and gentlemen of the jury. The evidence of the plaintiff in this case will show that on May 2d, 1926, a warehouse at the station of Badger, Benton County, Washington, was destroyed by fire. This is a station which has no inhabitants—no business houses and even the station itself does not have an agent—a station agent—a ticket agent. The only inhabitants are two railroad employees and one employee of Peter Agor, who owned the wool which was in the warehouse. The warehouse was totally destroyed by the fire and the wool contained therein was burned and destroyed. The wool was of the

value of over twenty thousand dollars—between twenty and twenty-one thousand dollars.

The evidence will show that this wool was owned by a man in the sheep business by the name of Peter Agor; that he stored the wool in the warehouse and that immediately prior to the breaking out of the fire a train operated on the main line of the defendant—the Northern Pacific Railway Company—passed through. This train was a freight train, approximately seventy cars, drawn by two engines. The evidence will show that immediately—before reaching the station of Badger there is a heavy up grade for a distance of some five or six miles; that the trains coming up this grade labor heavily and emit large quantities of sparks—live coals and cinders from the smokestack.

The evidence will show that the fire was discovered immediately after the train went through and at that time was just in the process of getting started hard. [49—3] That at the time of the fire there was a heavy wind blowing from the direction toward the warehouse from the track. In other words, as the train passed by the wind was coming in a direction to blow any emission of sparks, live coals or cinders toward the warehouse which was a distance of about approximately thirty or forty feet away from the track.

The evidence will show that the fire started at the base of the warehouse on the side closest to the track and that the day and the climate and the weather were such that everything was as dry as tinder and that weeds and other combustible ma-

(Testimony of Higinio Fernandes.)

terials were blowing around and had collected at the base of the warehouse.

The evidence will further show that there is no other probable or possible cause for this fire than that it was caused by sparks or live cinders, communicated from the defendant's engine, and the evidence will further show that the communication of these sparks and live coals and cinders under the circumstances present in this case constituted negligence on the part of the defendant.

The cause of action which the owner of the wool acquired by the destruction of his wool is assigned to the plaintiff in this case, the General Insurance Company, who paid to him the full amount—the full value of the wool and took from him an assignment of his cause of action against the railroad company.

Mr. WINDERS.—With your Honor's permission, I will reserve my statement at this time.

The COURT.—Yes. Call your first witness. [50—4]

TESTIMONY OF HIGINIO FERNANDES, FOR PLAINTIFF.

HIGINIO FERNANDES, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination.

(By Mr. GRAHAM.)

Q. State your name. A. Higinio Fernandes.

Q. What nationality are you, Mr. Fernandes?

(Testimony of Higinio Fernandes.)

A. Spanish.

Q. How long have you been in this country?

A. About thirteen years.

Q. What has been your occupation since you have been in this country? A. Herding sheep.

Q. Sheep—herding sheep? A. Yes, sir.

Q. During May, 1926, by whom were you employed? A. By Mr. Peter Agor.

Q. By Pete Agor? A. Yes, sir.

Q. And how long had you been employed by Mr. Agor?

A. I had been employed about six years—close to about six years.

Q. Under what arrangements were you employed? What were your duties?

A. My duties—I took charge of that place down there from the first of the year 1926. I was down there as head man for the outfit.

Q. You were head man? [51—5]

A. Yes, sir.

Q. And where were you living—where were you staying?

A. I stayed down at Badger most of the time.

Q. At Badger? A. Yes, sir.

Q. Now, in May—the latter part of April and the first part of May what particular work were you doing at Badger? A. That was lambing time.

Q. Lambing? A. Yes, sir.

Q. And where did you live at Badger?

A. Right there in the shack that they have got right there at Badger.

(Testimony of Higinio Fernandes.)

Q. In a shack? A. Yes, sir, or a cabin.

Q. Now, where was this shack in relation to the warehouse at Badger?

A. Oh, it is about—well, I would say about 150 yards from the warehouse.

Q. 250 yards?

A. 150 yards. I am not sure just what it was.

Q. You will have to speak a little louder, Mr. Fernandes. I cannot hear you well back here. About 150 yards you say?

A. Something like that, yes.

Q. And was it on the same side of the track as the warehouse? A. Yes, sir, on the east side.

Q. On the east side? A. Yes, sir.

Q. Now, the tracks run in what direction through Badger? [52—6]

A. The tracks run north and south.

Q. And this warehouse—how many feet was it away from the main tracks of the railroad?

A. Why, I don't know. About fifty feet—about.

Q. About fifty feet? A. Yes, sir.

Q. Did you ever measure it? A. No.

Mr. WINDERS.—Then I move to strike the answer, if the Court please. He does not know.

Mr. GRAHAM.—Well, he can give the best of his recollection—

Mr. WINDERS.—(Interrupting.) I think not. I think that is a matter that he must be sure about. I have a plat here. Now, your Honor, here is an insurance company that has investigated this thing from one end to the other—

(Testimony of Higinio Fernandes.)

Mr. GRAHAM.—I do not think that your objection requires a stump speech.

The COURT.—How is that?

Mr. GRAHAM.—If counsel wants us to use his plat I will be very pleased to use it.

The COURT.—Very well.

Mr. WINDERS.—I move that the answer of the witness be stricken. There is a way to get at these things and I might add that I did not mean to make any stump speech.

Mr. GRAHAM.—I object to counsel's argument. I do not think that he should argue to the jury.

The COURT.—What was the witness' answer? [53—7]

(Question and answer read as follows: "Q. Did you ever measure it? A. No.")

The COURT.—I do not think that should be stricken. He says that he did not measure it, that is all.

Mr. GRAHAM.—Counsel remarked that he had a plat. If he will produce that we will be pleased to avoid any guessing as to distances.

Mr. WINDERS.—Well, I offered it to you the other day and I give it to you now. In putting the plat on the easel I would respectfully suggest that it might be well to put the north at the top.

(Plat is put on easel.)

Q. What had you been doing during the day of May 2d? By the way, what day of the week was that? A. It was a Sunday.

(Testimony of Higinio Fernandes.)

Q. A Sunday? A. Yes, sir.

Q. What had you been doing during the day?

A. That day we went up to see some sheep that was up on a hill.

Q. That was up where?

A. Up on a hill, after dinner.

Q. Now, where did you have dinner—when did you have dinner? A. About twelve o'clock.

Q. And when did you come back to the station?

A. Well, I don't know. About half-past four or four o'clock. I ain't sure what time it was.

The COURT.—In the evening?

The WITNESS.—In the evening, yes, sir. [54—8]

Q. Half-past four in the afternoon, do you say?

A. About four or half-past four.

Q. And what was the condition of the weather? Had it rained or had it been dry for some time previous to May 2d? A. It had been dry.

Q. And what was the—was there a wind or was it quiet? A. At noon there was a wind blowing.

Q. There was a wind blowing? A. Yes, sir.

The COURT.—You might ask him which way.

Q. What direction—which way?

A. It was a west wind.

Q. A west wind? A. Yes, sir.

Q. You speak about a west wind? You mean it was coming from the west?

A. Yes, coming from the west.

Q. Going towards the east? A. Yes, sir.

(Testimony of Higinio Fernandes.)

Q. And what did you do when you came back to the cabin about 4:30?

A. I don't remember now. I know as close as I can tell that we had supper. The section foreman called to have supper in my cabin.

Q. Was he section foreman on the Northern Pacific Railway? A. Yes, sir.

Q. And he lived at this station also?

A. Yes, sir.

Q. Step down and point out on the plat, Mr. Fernandes, where [55—9] your cabin was and where the section foreman's cabin was and who else lived at this station.

A. Another employee of the railroad.

Q. Do you know his name?

A. I know it to be George.

Q. George? A. Yes, sir.

Q. Outside of those three were you the only people there at the station that day? A. Yes, sir.

Q. Just the three of you? A. Yes, sir.

Q. Now, point out with a pointer—can you read, Mr. Fernandes? A. Yes. I can read a little.

Q. Well, can you find on this plat—can you find there where the—

A. (Interrupting.) This is where the station foreman stayed.

Q. This is where the station foreman stayed (indicating)? A. Yes, sir.

The COURT.—Have him mark those in some sort of fashion on the plat.

(Testimony of Higinio Fernandes.)

Mr. GRAHAM.—We will mark that point "A."

The COURT.—He is marking your exhibit up, Mr. Winders.

Mr. WINDERS.—Oh, that is all right. I have no objection.

(Mr. Graham marks point "A" on plat.)

Q. Can you point out on this map where George stayed? [56—10] A. This map is upside down?

Q. This map is upside down? A. Yes, sir.

Q. Well, we will put it the other way.

A. It seems to me that we can get at it better this way (indicating). This is upside down.

Q. Now, after turning the map around again, where was George's cabin?

A. George was across the track, around here some place (indicating). This is Saligandus (indicating)?

Q. Yes.

A. This is where the other fellow is supposed to be.

Mr. WINDERS.—The names are on there.

A. Well, I cannot read it upside down. It is around in there some place.

Mr. GRAHAM.—Mark that point "B"—this has not been identified as an exhibit. Shall we call this Defendant's Exhibit "A"?

Mr. WINDERS.—That is all right with me.

The COURT.—Make it "A-1."

Mr. WINDERS.—I am willing to claim ownership.

(Testimony of Higinio Fernandes.)

(Whereupon map was admitted in evidence as Defendant's Exhibit 'A–1.")

Mr. GRAHAM.—I will mark that point "B."

(Point "B" marked on Exhibit "A–1.")

Q. On Defendant's Exhibit "A–1" point "B" is George's cabin? A. Yes, sir.

Q. Just take the stand again, Mr. Fernandes. Now, how near was the nearest inhabitant other than you and the two [57—11] railway men? How near was the nearest rancher or farmer?

A. I don't know. About a mile and a half or two miles. There is not much farming around there.

Q. Anybody in the station? Anybody living there or staying there? A. No.

Q. Is there any resident of the station at Badger outside of you three?

A. Well, there was another railway man, but he was not there.

Q. He was not there on that day? A. No, sir.

Q. What was in the warehouse on the day?

A. What?

Q. What was in the warehouse on that day?

A. There was some grain and wool and that is all I know about.

Q. How much grain?

A. There were about fifty or sixty sacks.

Q. And how much wool?

A. I don't know for sure, but about two hundred sacks, I think. Something like that. I ain't sure.

Q. Was the warehouse kept locked at all times?

A. Most of the time locked, yes.

(Testimony of Higinio Fernandes.)

Q. Most of the time. You mean, when nobody was in the warehouse was it locked at all times?

A. Yes, sir; supposed to be locked at all times, yes.

Q. What did you do after you finished dinner?

A. I don't know. We stayed around there and after we had [58—12] dinner we went to his shack—the section foreman's shack.

Q. Where did you have dinner—in your shack or his? A. Yes, in my shack.

Q. And then you went over to his shack?

A. Yes, sir.

Q. And did you go out that night before you went to bed to do anything in regard to lambs?

A. Well, I went to his shack and stayed there after we had supper or dinner or whatever you want to call it.

Q. And when did you go to bed?

A. I cannot tell for sure. It must have been half-past seven or eight o'clock. Between that time. I ain't sure.

Q. What was the next thing that happened?

A. Well, the next thing happened when he called me up.

Q. Who?

A. The section foreman.

Q. He woke you up, did he? A. Yes, sir.

Q. And what did you do?

A. I got up and I went out to see what was the matter.

(Testimony of Higinio Fernandes.)

Q. And what did you see? A. I saw the fire.

Q. Now, what time was that?

A. Well, that was—that must be about pretty close to 10:00 o'clock, I guess.

Q. 10:00 o'clock?

A. I ain't sure about that.

Q. And when you saw the fire where was it? [59—13] A. It was on the southwest side.

Q. The southwest side?

A. The southwest corner.

Q. Of what? A. Of the warehouse.

Q. Of the warehouse? A. Yes, sir.

Q. Was that the corner of the warehouse closest or furthest away from the railroad tracks?

A. It was the closest corner.

Q. And where was the fire headed—had it gained considerable headway? Was it a big fire at that time or how far had it gone?

A. It was quite a bit of fire.

Q. I beg your pardon.

A. There was quite a bit of fire.

Q. Had it reached the roof?

A. I don't think so. It was not at the roof yet.

Q. It was not at the roof yet? A. No, sir.

Q. How far up—or how far had it gone towards the roof?

A. Well, I don't know. About halfway up.

Q. About halfway up? A. Yes, sir.

Q. Where did it appear to have started from?

A. Well, it appears—it seems to me—

(Testimony of Higinio Fernandes.)

Mr. WINDERS.—(Interrupting.) I think the witness should state what he observed, your Honor.

The COURT.—Yes. State that.

A. I cannot say where it started, but it seemed to me that [60—14] it was started from the ground.

Mr. WINDERS.—What did he say?

Mr. GRAHAM.—I didn't get his answer. Are you objecting?

Mr. WINDERS.—Yes.

The COURT.—Just tell what you saw.

A. I just saw the fire.

The COURT.—How far it extended up and where it was.

A. All that side of the building was on fire. That is all I can remember.

Q. Well, from what direction? Was it burning from the roof down or from the ground up?

A. From the ground up.

Q. And what did you do?

A. Well, I went out and I didn't know what to do. The first thing he said was that he had better get his stuff out of the shack.

Q. Who said that? A. The section foreman.

Q. Did you try to put the fire out?

A. There was no use to try. There was too much fire to try to put the fire out.

Q. Did you have any fire devices there or was there anything with which you could put it out? Any water?

(Testimony of Higinio Fernandes.)

A. We didn't have any water there to do it with.

Q. Did you help him save his things out of the shack? A. Yes, sir.

Q. Did his shack burn down during the fire?

A. No.

Q. How long did the fire last? [61—15]

A. Oh, I don't know. All night, I guess.

Q. And you were there all the time?

A. Yes, we were there all the time.

Q. Was there anything saved out of the warehouse? A. Saved?

Q. Yes. A. No.

Q. "No" was your answer, was it?

A. Yes, sir.

Q. Was the warehouse completely destroyed?

A. Yes, sir.

Q. Now, what is the station that is closest to Badger on the west? A. What station?

Q. Yes. What station—what is the first station west of Badger of any size?

A. You mean station on the west?

Q. Yes.

A. You mean, don't you, on the north side?

Mr. WINDERS.—The directions are really north and south there, Mr. Graham. The railroad men call them northwest and southeast.

A. North side?

Q. Yes.

A. North and south it seems to be to me.

(Testimony of Higinio Fernandes.)

Q. What is the name of that station—where is Kiona?

A. Kiona is about seven miles from Badger.

Q. Northwest? A. North.

Q. North? [62—16] A. Yes, sir.

Q. And what is the condition of the ground—was it flat or upgrade or downgrade between Kiona and Badger? A. It is mostly upgrade.

Q. From Kiona to Badger upgrade did you say?

A. Upgrade.

Q. Is it a steep or stiff grade?

A. There is quite a bit of grade.

Q. When the trains go up that grade do they—do you notice any laboring or hard work getting up the grade—pulling the load?

A. Well, it generally pulls pretty hard.

Q. In what way do they work hard? What is the result of that? A. I don't understand.

Q. I beg your pardon?

The COURT.—What do you see about the engines when they go up this grade?

A. I see lots of smoke.

The COURT.—How is that?

A. I see lots of smoke.

The COURT.—And what do you hear?

A. I don't hear nothing just the puffing.

Q. Just the puffiing? A. Yes, sir.

Q. And what did you see besides smoke?

A. Well, I didn't see anything much until this

(Testimony of Higinio Fernandes.)

summer. I kind of watched this summer and I saw some sparks coming out of the engine.

Q. Sparks coming from where? [63—17]

A. From the chimney or whatever they call it, but I never paid attention before.

Mr. WINDERS.—Then I move to strike his previous answer.

The COURT.—I think I will let it stand. Denied.

Mr. WINDERS.—Exception.

Mr. GRAHAM.—I think that is all. You may cross-examine.

Cross-examination.

(By Mr. WINDERS.)

Q. Mr. Fernandes, you were in charge of Ben Agor's sheep camp around there? A. Yes, sir.

Q. So that the jury may not get the wrong impression, there never has been any depot, station, or telegraph operator in that station, has there?

A. Not since I have been there.

Q. There never was any agent there?

A. Well, about four or five years ago there was an agent there.

Q. Well, that is what somebody told you?

A. Well, I was there at that time.

Q. He was just a telegraph operator, wasn't he?

A. He was just a telegraph operator.

Q. That was all? A. Yes, sir.

Q. As a matter of fact, this place of Badger, the railroad company has a number of passing tracks, don't they? A. Yes, sir. [64—18]

(Testimony of Higinio Fernandes.)

Q. And the trains pass there. A. Yes, sir.

Q. And they store large numbers of freight-cars on those tracks, do they not, at Badger?

A. Yes, sir.

Q. Now, you were talking something about the grade from Kiona up to Badger. What do you know about the grade?

A. Well, I know that there is a grade going up the hill.

Q. Well, where does the grade run with reference to the Badger station? Is there still a grade when you get by what you call Badger?

A. I don't think so.

Q. Isn't it a fact that three-quarters of a mile before you get into Badger you are on a level grade and on a descending grade? Do you know that?

A. Well, I ain't sure.

Q. And it had been the habit of the railroad company to put on a helper engine on freight trains at Kiona and the helper engine would cut off at Badger, wouldn't it. That is, ordinarily. That they would take the second engine off at Badger, isn't that right? A. Sometimes.

Q. Well, they would do it right along, wouldn't they, except on the last trip at night?

A. I don't know anything about at night.

Q. But you do know that this second engine that they put on at Kiona, that engine would come with the freight train up as far as Badger and then they would cut the engine off?

(Testimony of Higinio Fernandes.)

Mr. GRAHAM.—I do not think that that is proper [65—19] cross-examination.

A. I don't know.

Mr. GRAHAM.—I didn't ask him anything about engines.

Mr. WINDERS.—You had him talking about grades. I didn't know why you wanted to call a sheep herder for grades, but you have done so.

Mr. GRAHAM.—I do not need to ask for your judgment about that.

The COURT.—He did not ask him about the engines or the make-up of the trains.

Mr. WINDERS.—Very well.

The COURT.—The objection will be sustained.

Q. Now, will you just come down here, please, Mr. Fernandes. Take this print here. The direction towards Pasco is generally a southerly direction. This is towards Pasco (indicating)? A. Yes, sir.

Q. South? A. South and southeast.

Q. Yes, south? A. Yes, sir.

Q. So that in accordance with the directions—from Seattle that is south and then towards Seattle and Kiona it is north, is it not? A. Yes, sir.

Q. Now, the warehouse that was burned is on the east side of the track? A. Yes, sir.

Q. And that is indicated here where it says "Former warehouse." Is that the location of the warehouse? [66—20]

A. That is the location of the warehouse.

Mr. WINDERS.—I will put a "W" there although it is already marked.

(Testimony of Higinio Fernandes.)

(Whereupon letter "W" is marked upon Exhibit "A-1.")

Q. Then to the north of this warehouse is where Art, the section foreman lived? A. Yes, sir.

Q. There was an old box-car set out there and he lived in there? A. Yes, sir.

Q. All right. And then to the south the company had an ice-house, did it not?

A. Yes, sir; an ice-house.

Q. And then a little farther to the south there was an old cistern where they used to keep water?

A. Yes, sir.

Q. And then your place was down farther south about one hundred and fifty yards or about four hundred and fifty or five hundred feet?

A. Yes, sir, just about.

Q. Just about? A. Yes, sir.

Q. Then across the track on the west side it is marked "Section Tool-House." A. Yes, sir.

Q. Is that where the tool-house would be located?

A. Yes, sir, just about.

Q. And this is their gasoline tank (indicating). That is about where it would be located. You remember that they have a little iron tank? [67—21]

A. Yes, sir.

Q. And then a house where George lived—you have marked that "B." That is where he lived?

A. Yes, sir.

Q. One of the sectionmen? A. Yes, sir.

Q. And then there is another house marked "D.

(Testimony of Higinio Fernandes.)

H. Wagner." That was another sectionman who lived there? A. Yes, sir.

Q. And here is another cistern on this side?

A. Yes, sir.

Q. And here is what you call the station?

A. Yes, that is what we call the station.

Q. And then back of the station there are some old improvements—some rancher used to live in there? A. Yes, sir.

The COURT.—How far?

A. About half a mile. I ain't sure about that.

Q. As a matter of fact, those old buildings where the postoffice used to be were within three hundred feet, weren't they? A. The postoffice?

Q. Well, there used to be an old shed there.

A. There used to be an old school there.

Q. And that is only about three hundred or four hundred feet from the track, is it not?

A. Yes. I ain't sure.

Q. Now, on both sides of the tracks—on both the east side and the west side there are hills.

A. Yes, sir. [68—22]

Q. It is hilly around there, isn't it?

A. Yes, sir.

Q. And gradually that country has been turned over to grazing and raising of sheep.

A. Yes, sir.

Q. It used to be that they would raise wheat in there, isn't that right? A. Yes.

Q. And that warehouse was originally built as a wheat warehouse? A. Yes, sir.

(Testimony of Higinio Fernandes.)

Q. And gradually the sheepmen have taken up the whole country? A. Well, not the whole country.

Q. Well, they have taken up a good deal of it, haven't they? A. Taken what?

Q. I mean, they are using it.

A. Well, some of the farmers are using it too. Some of the farmers are.

Q. Well, there aren't very many farmers there, isn't that right? A. Well, they haul wheat there.

Q. Where do they haul wheat?

A. Up in the Horse Heaven country.

Q. I am talking in the immediate vicinity of the station there. A. I don't know about that.

Q. Farther to the south and towards Pasco you have a kind of a corral down there where you shear your sheep, haven't you? A. Yes, sir. [69—23]

Q. That is about where—in line with where your house would be, but probably about a thousand feet south? A. Yes, sir.

Mr. WINDERS.—Just take the stand again.

Q. Now, these sheep of Mr. Agor—there are other sheepmen in that country, are there not?

A. Yes, sir.

Q. As a matter of fact, on this Sunday you were having trouble with another sheepman, weren't you?

A. Yes, we were having trouble.

Q. You had asked the section foreman and his helper to go up with you in the hills to drive another man's sheep off of your range? A. Yes, sir.

Q. And when you got up there you found a boy by the name of Christianson up there?

(Testimony of Higinio Fernandes.)

A. Yes, sir.

Q. And you told Christianson that he had better keep off your range? A. Yes, sir.

Mr. GRAHAM.—I object to that. That is immaterial.

Mr. WINDERS.—I don't know that it is immaterial. You asked him what he did that afternoon.

The COURT.—He has already answered. Proceed.

Q. And you told Christianson that he had better tell his father that if he didn't keep off of there you would get him?

Mr. GRAHAM—I object to that.

The COURT.—Sustained.

Q. There was considerable animosity and difficulty between [70—24] you sheep fellows that were using these ranges around Pasco, wasn't there?

A. Yes, sir.

Mr. GRAHAM.—I object to that as incompetent, irrelevant and immaterial and not proper cross-examination.

The COURT.—Sustained.

Q. And as a matter of fact, Mr. Fernandes, either you or a ranger that you would have would go out over your range every day to see if any one was putting horses on it or sheep, and if they did to drive them off? A. Yes, sir.

Q. And you had some people around there that did not like you any too well.

Mr. GRAHAM.—I object to that as incompetent, irrelevant and immaterial.

(Testimony of Higinio Fernandes.)

The COURT.—Sustained.

Q. You and Art the section foreman and George after you had been up clearing your range of these sheep came down about 4:00 o'clock or 4:30?

A. I ain't sure about that. Just about.

Q. And you took the section foreman over to your place to dinner? A. Yes, sir.

Q. You cooked dinner? A. Yes, sir.

Q. What kind of a stove do you have?

A. What kind?

Q. I beg your pardon?

A. I don't know what kind it was. [71—25]

Q. Well, what did you burn? A. What?

Q. What did you burn? A. Wood.

Q. Wood? A. Yes, sir.

Q. How much—you called it a shack,—yo won't take offense if I call it a shack, too? How large was the place where you lived, Mr. Fernandes?

A. My shack?

Q. Yes. How large was your place?

A. Just a little shack—a small shack.

The COURT.—Ten by twelve or forty by fifty, which was it?

Q. Just one room, isn't it?

A. Just one-room shack.

Q. One room? A. Yes, sir.

Q. And then after you and the section foreman had had your dinner you went from your house, which is down to the south of the ice-house and the cistern five hundred feet—how did you get up to the

(Testimony of Higinio Fernandes.)

section foreman's house? Did you go in front or did you go back of the warehouse?

A. I do not remember which way we went

Q. There was a road back of the warehouse, was there? A. Yes, sir.

Q. Which runs right alongside of the warehouse?

A. Yes, sir.

Q. You don't know which way you went?

A. No, sir. [72—26]

Q. But, anyhow, you got down there somehow?

A. Yes, sir.

Q. And you stayed down here at the section foreman's house until about 7:30 or so?

A. Something like that. I ain't sure.

Q. And then you went back to your place?

A. Yes, sir.

Q. Do you remember how you went back? Whether you went along the track?

A. Yes, I remember the way I went back.

Q. You went along the track?

A. No, I went on this side of the track.

Q. I beg your pardon.

A. I went on this side of the warehouse.

Q. You went along this road?

A. Yes, sir, between that road and the warehouse.

Mr. GRAHAM.—I didn't hear that.

Q. You went between that road and the warehouse?

A. Yes, sir. On this side of the warehouse I went.

Q. And then as I understand it you went to sleep?

(Testimony of Higinio Fernandes.)

A. Yes, sir.

Q. And about 10:00 o'clock the section foreman awakened you? A. Yes, sir.

Q. I wish you would just come down, Mr. Fernandes, and mark on this print where the fire was in this warehouse when you got there after the foreman had called you. Take your time. This is north and this is south, and here is the ice-house, and this is the warehouse, and here is Art's place and your place is down in here somewhere (indicating)? [73—27] A. You mean where the fire was?

Q. Well, where was the fire when you got there?

A. Well, the fire was on this side (indicating).

Q. You mean that it was on the south end?

A. It was on the south end. On the west side—on the southwest side.

Q. Well, was there any fire—now, south is towards Pasco, isn't it? A. Yes, sir.

Q. And the railroad track is to the west of the warehouse?

A. The railroad track is to the west of the warehouse.

Q. Was there any fire on the west side of the warehouse when you got there?

A. I don't know. I don't remember.

Q. The fact of the matter is that the fire was all in this south end, wasn't it? A. Yes, sir.

Q. And the fire was burning up from the floor?

A. From the bottom. I don't know whether it was on the floor.

(Testimony of Higinio Fernandes.)

Q. Well, there was no fire on the ground at that time, was there? A. Well, I don't know.

Q. Just take the chair. This warehouse is built up on piles five or six feet, isn't it? A. Yes, sir.

Q. So that the door of the warehouse would be about level with the door of a car? A. Yes, sir.

Q. So that this warehouse would be setting up here aways? [74—28] A. Yes.

Q. And this we will say is your floor level. Now, what I am asking you is when you got out there and saw this fire on this south side— A. Yes.

Q. (Continuing.) —was there any fire in those piles on the ground?

A. I ain't sure of that. I know there was quite a bit most all over there.

Q. I beg your pardon?

A. There was fire most all over. There was fire on the side, I remember.

Q. Yes, there was fire on the side, but what I am asking you, had the fire at that time reached the ground or was there any fire on the ground?

A. I don't know.

Q. Isn't it a fact, Mr. Fernandes, that when you got there—here is the east end of the warehouse and your tracks over here (indicating)—the fire had broken out through the south end of this warehouse from the floor and it was going up probably fifteen or twenty feet and had burned down about two feet on the piles but had not reached the ground at that time? A. I don't know.

Q. You don't know?

(Testimony of Higinio Fernandes.)

A. I don't know for sure.

Q. You said that it was dry and it had not been raining any? A. Yes. It was kind of dry.

Q. It is a pretty dry country around there, isn't it, Mr. Fernandes? [75—29]

A. It is dry, yes, sir.

Q. Pretty much sand and sagebrush, isn't it?

A. In some parts—in some places.

Q. I beg your pardon?

A. In some places it is sand.

Q. Well, take around your place there. Is there anything that has any life to it—any greenness at all excepting sagebrush?

A. Well, nothing but sagebrush around in there. Of course, sometimes when the wind blows there are some weeds there.

Q. I cannot hear you.

A. Not so much around that place where we are in.

Mr. GRAHAM.—How is that?

The COURT.—There is nothing else except sand and sagebrush around the place where he lives, as I understand his testimony.

A. This is a kind of open place.

Q. There is not anything around what we call that station of Badger excepting sagebrush, is there?

A. Sometimes some weeds.

Q. Sometimes some weeds? A. Yes, sir.

Q. Where? A. All over that country.

Q. Where? A. Most all over.

Q. Most all over? A. Yes, sir.

(Testimony of Higinio Fernandes.)

Q. Now, are there any weeds? You have got fenced in two [76—30] or three acres back of your house, haven't you? A. Mr. Agor has.

Q. Mr. Agor has? A. Yes, sir.

Q. Are there any weeds there?

A. None inside of the fence.

Q. What?

A None inside of the fence. There are no weeds in there.

Q. Are there any weeds between your fence and the railroad track?

A. Well, I don't know. I never paid much attention.

Q. Did you ever see any weeds there?

A. I see some weeds there once in a while; yes, sir.

Q. Now, do you have any shelter for your sheep there? A. No, no shelter no.

Q. You would bring your sheep—your sheep were up in the hills at this time—in May, were they not?

A. The sheep were all out already.

Q. The sheep were already out?

A. Yes, sir, the sheep were already out.

Q. The sheep were all up in the hills, weren't they? A. In the mountains, yes, sir.

Q. You didn't have any lambs around there, did you? A. Not much.

Q. You would bring the sheep down in the fall and you would herd them there, wouldn't you, in the winter? A. Yes, sir.

(Testimony of Higinio Fernandes.)

Q. You did not purport to have any shed or any shelter or anything of that kind?

A. No. [77—31]

Q. And you fed them, of course, some, didn't you? A. Yes, sir.

Mr. GRAHAM.—I think this is entirely immaterial, how they take care of their sheep.

The COURT.—There is nothing unanswered.

Q. Now, you do have some rain over there in March or April, don't you? A. Some lambs?

Q. I say you have some rain in March and April, don't you? A. Sometimes, yes, sir.

Q. As a matter of fact you had a storm over there when you were shearing so that you had to stop shearing, didn't you? A. Yes, sir.

Q. Now, this so-called station of Badger, that is on the main line of the Northern Pacific?

A. Yes, sir.

Q. Some thirteen or fourteen miles, so that the jury can get it located, this side of Kennewick?

A. Yes, sir.

Q. And not very far from Pasco? A. No.

Q. You say you had not seen anyone around the station that day? A. No, I had not.

Q. Had your ranger—the man that goes out on horseback to see that no one is on your range—

A. Yes, sir.

Q. (Continuing.) —had he been around there that day? A. Anybody you mean? [78—32]

Q. The man that rides the horse?

(Testimony of Higinio Fernandes.)

A. Well, I don't know. I don't see nobody that day.

Q. You hadn't seen him? A. No.

Q. Where do the herders come? Where do they get their food and their supplies?

A. The herders?

Q. Yes.

A. There were no herders around in there.

Q. There were no herders around in there?

A. No, sir.

Q. I didn't ask you that. I asked you where they got their supplies? A. Well, wherever they can.

Q. Well, you keep some of that in this warehouse, don't you—didn't you? A. Keep what?

Q. You kept some of their supplies in this warehouse, or did you keep them in the shack?

A. We kept it in the shack.

Q. The shack was about ten by twelve feet, wasn't it?

A. Well, there are two or three shacks around there.

Q. How many?

A. There are two or three shacks around there.

Q. How large are the other shacks?

A. About the same size, more or less.

Q. How large are the other shacks?

Mr. GRAHAM.—He has answered.

A. I ain't sure. I don't know.

Q. I beg your pardon, I didn't hear you. About the same [79—33] size? A. Yes, sir.

(Testimony of Higinio Fernandes.)

Q. Now, you had charge of this warehouse, didn't you? A. No, I didn't have charge of it.

Q. You didn't have charge of it? A. No, sir.

Q. Well, who had the key to it?

A. Well, the key was generally left in the door—on the side of the door at the bottom.

Q. You would leave the key lying there at the door? A. Yes, sir.

Q. And you had your 1925 crop of wool in the warehouse? A. It was there, yes, sir.

Q. And you had the 1926 crop? A. Yes, sir.

Q. And you had some oats in there?

A. Yes, sir.

Q. I noticed the other day over there where you built a new little warehouse and shed?

A. Yes, sir.

Q. I noticed corn and oats coming out of the side. What causes that?

Mr. GRAHAM.—I object to that. That is improper cross-examination and it is immaterial.

The COURT.—Sustained.

Mr. GRAHAM.—This is a new warehouse.

Q. Well, how about rats over there? Have you got a lot of them?

A. I guess there are quite a number of them.

Q. I beg your pardon? [80—34]

A. I guess there are rats.

Q. Well, you know there are lots of rats over there, don't you? A. Yes, sir.

Q. You know there are so many rats in that cave

(Testimony of Higinio Fernandes.)

over there now that you are almost afraid to go in there, isn't that a fact?

A. Yes, sir; there are rats there.

Q. And you know that they were through this warehouse that burned down and you know they are in your present warehouse. A. Yes, sir.

Q. In this warehouse did you have anything else in there besides this wool and these oats?

A. Not that I know of.

Q. Didn't you have your sheep shearing machinery and one thing or another of that kind in there?

A. There was some old shearing machinery around there, but I never paid much attention to it.

Q. Well, there was some machinery around there, wasn't there? A. Yes, sir, there was.

Q. As a matter of fact, the sheep shearers had been there—some of them had slept in that warehouse, hadn't they? A. Yes, sir.

Q. And some of their old clothes were in there.

(Witness does not answer.)

Q. As a matter of fact, if this fire were to occur now—if this jury were to go over there now it would find in the debris under this warehouse teakettles and cooking utensils, wouldn't it? [81—35]

A. Yes, sir.

Q. And cans of all kinds that had been in that warehouse that burned? A. Yes, sir.

Q. You did not mean to say, when you were talking to Mr. Graham about this southwest corner—the fire in this south end—one corner of this warehouse was not any closer than another, was it? I

(Testimony of Higinio Fernandes.)

mean, the warehouse was the same distance from the track its entire length, wasn't it?

A. Well, the southwest corner is closer than the east corner.

Q. Yes. It is closer than the back of it?

A. Yes, sir.

Q. But I mean as far as the front of the warehouse is concerned, it is the same distance or it was the same distance from the track all along the front, wasn't it? A. Yes, sir.

Q. Everything that was in this warehouse belonged to Mr. Agor, didn't it? A. Yes, sir.

Q. He owned the oats and he owned the wool?

A. Yes, sir.

Q. This whole warehouse was all in a bunch of flames pretty quick after you got there, wasn't it?

A. Yes, sir.

Q. And it was the wool and everything else that was burned up by the morning? A. Yes, it was.

Mr. WINDERS.—That is all. [82—36]

Redirect Examination.

(By Mr. GRAHAM.)

Q. Where were you standing when you first saw the fire? A. Where I was standing?

Q. Yes. Were you standing south of the warehouse or—

The COURT.—(Interrupting.) Just step down and point out where you were standing.

Q. Point out on the map?

A. I was outside of the door from the shack.

(Testimony of Higinio Fernandes.)

Q. From your shack? A. Yes, sir.

Q. What direction would that be from the warehouse?

A. It would be south—on the west side of the shack.

Q. It was on the west side of the shack?

A. Yes, sir.

Q. But what direction from the warehouse?

A. Well, south.

The COURT.—Have you not got it on the map there? I think the jury knows.

Q. South of the warehouse? A. Yes, sir.

Q. Now, from where you were standing could you see whether the fire was actually burning on the west side of the warehouse?

A. Well, I could not see it; no.

Q. And where was the fire when you saw it? More towards the west of the south side or more towards the east of the south side?

A. More towards the south—towards the south side, it seemed to me. [83—37]

Q. I will ask the question again.

A. On the south side more.

Q. Well, was it all along the south side or was it part of the south side?

A. Well, I cannot see on the south side from the shack, you see. I could not see it.

Q. Well, the whole south end was burning or part of the south end was burning?

A. Well, part of it. I ain't sure.

(Testimony of Higinio Fernandes.)

Q. Which part—closest to the west or closest to the east? A. On the south side.

Q. Just step down, Mr. Fernandes. Stand right over here. Now, here is the south end of the warehouse (indicating). A. Yes, sir.

Q. And you were standing over south of the warehouse near your shack when you first saw the fire?

A. Yes, sir.

Q. Now, looking over there you say part of the south end was burning. That is, it was not burning all along the south end but part of it. Now, which part? Was it the part closest to the railroad track or was it the part furthest away from the railroad track?

A. Just about here. I guess (indicating on map).

Q. About there (indicating)?

A. Yes, sir.

Q. That would be what part of the south end?

A. That would be about the west side, isn't it—more on the west side.

Mr. WINDERS.—Better mark it.

Mr. GRAHAM.—Take your seat. [84—38]

Q. You said there were weeds around here in this country. Were they any Russian thistles?

A. Sometimes I see some blown around there. Of course I never paid attention.

Q. But there are Russian thistles that blow around that country? A. Yes, sir.

Q. That is, when the wind is blowing?

A. Yes, sir.

(Testimony of Higinio Fernandes.)

Q. Now the key, you say, was kept near the door. Was it kept out in the open where anybody could get it, or did you put it in a hiding place?

A. No. Most anybody could get it.

Q. Was it hung on a hook, or was it put in a hole?

A. It was put in a hole.

Q. It was put in a hole?

A. Yes, sir. Just a hole in the floor right by the door.

Q. It is a hole where the cats got through?

A. Yes, sir.

Q. And you stuck the key in that hole?

A. Yes, sir.

Q. If anybody reached in the hole there they could find the key? A. Yes, sir.

Q. And that is why you say that anybody could get it? A. Yes, sir.

Q. You say that there are cooking utensils in the debris of that warehouse. Have you searched through that debris so that you know there are cooking utensils in there?

A. How do you mean? [85—39]

Q. Well, Mr. Winders said that right now there were cooking utensils and dishes in the ashes of the old warehouse. Have you examined the ashes yourself so that you know that to be the fact?

A. I never examined it, no.

Q. Have you ever seen any cooking utensils in the debris—in those ashes?

A. Well, you see it most all over that country.

Q. You see it most all over that country?

(Testimony of Higinio Fernandes.)

A. Yes, sir.

Q. You mean there is trash thrown out?

A. Yes, in most any place. There used to be a lot of homesteaders around there and there was a lot of dishes thrown around there.

Q. I just want to make sure that you understand the question. Have you seen in the ashes of that warehouse any cooking utensils or dishes?

A. No, I never paid attention.

Q. You said that the sheep herders sometimes slept in this warehouse. Had anybody slept in the warehouse on the day previous or on the day of this fire or the night previous?

A. They slept—oh, I don't know—about ten days I guess before. The sheep herder slept there.

Q. About ten days before the fire the sheep herder slept there?

A. Yes. I don't know how many days before, but the sheep herders had slept there.

Q. About ten days before?

A. Yes, sir. When they were shearing there.

Q. Had the shearing been finished before the fire?

[86—40] A. Yes, sir.

Q. How long?

A. Oh, I cannot say how many days.

Q. Had there been anybody sleeping in that warehouse after that shearing was over?

A. Not that I know of.

Q. Well, you would know. You were around there all the time?

A. I haven't seen anybody.

(Testimony of Higinio Fernandes.)

Q. And on that day you saw nobody around the station except the two railroad employees?

A. No.

Mr. GRAHAM.—That is all.

Recross-examination.

(By Mr. WINDERS.)

Q. Now Mr. Fernandes, I happened to be over to Badger the other day myself. Do you tell this jury—you have been over the ashes—you looked through the ashes that were from the fire, haven't you? A. No, I have not.

Q. You go by there every day, don't you?

A. Well, yes.

Q. Have you seen burned teakettles in those ashes—burned?

A. Well, I have seen a lot of stuff there. Lots of—

Q. Haven't you seen burnt pans? Pans that were burnt?

A. I didn't pay any attention to stuff like that.

Q. And you have been over there every day?

A. I have, yes, sir.

Q. Now, what did you see—what do you see in those ashes? What is over there now in those ashes? [87—41]

A. Well, I did not investigate. That ain't my business.

Q. You never investigated? A. No.

Q. Now, you say there was a hole for the cat to go in? A. Yes, sir.

(Testimony of Higinio Fernandes.)

Q. Unfortunately I had not seen the warehouse before it burned.

Mr. GRAHAM.—If the Court please, counsel is making some testimony in the record. He has not been sworn as a witness. I object to his remark.

Mr. WINDERS.—I was just asking him where that hole was.

Q. Where was this hole? On the east side?

A. On the north side.

Q. On the north side of what? A. Of the door.

Q. And you would slip this key right in that hole?

A. Yes, sir.

Q. If you looked in that hole you could see it, I suppose?

A. Well, I guess if somebody wanted it, they could get it.

Q. It was not unusual to see men who were riding without tickets around the station there—hoboes, in other words? A. What do you mean?

Q. I say, it was not an unusual thing to see hoboes around this place, was it?

A. No. You would see hoboes once in awhile.

Q. As a matter of fact, at times they have cut off trains there and stored the cars on the passing tracks, haven't they, probably as high as one hundred and fifty freight cars, haven't they? [88—42]

A. Yes, sir.

Mr. WINDERS.—That is all.

Mr. GRAHAM.—May I ask one question on redirect?

The COURT.—Yes.

(Testimony of Higinio Fernandes.)

Mr. GRAHAM. — Were there any freight-cars along the tracks on the day of the fire?

A. I do not remember.

Mr. GRAHAM.—You do not remember?

A. No, sir.

Mr. GRAHAM.—That is all.

(Witness excused.)

TESTIMONY OF HUGH PALMER, FOR PLAINTIFF.

HUGH PALMER, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination.

(By Mr. GRAHAM.)

Q. State your full name. A. Hugh Palmer.

Q. By whom are you employed?

A. The Northern Pacific Railway Company.

Q. You are a fireman, aren't you?

A. Yes, sir.

Q. And on May 2d you were a fireman on what number engine? A. 1618.

Mr. WINDERS.—Talk to the jury, Mr. Palmer; they want to hear you.

Q. That was the helper engine that went through? [89—43] A. Yes, sir.

Q. What time did your train go through Badger going towards Pasco?

A. Going through Badger going to Pasco?

Q. Yes.

(Testimony of Hugh Palmer.)

A. Right around 9:45 or 9:50.

Q. About 9:50? A. Yes, sir.

Q. There was a double-header. In other words, you had two engines on? A. Yes, sir.

Q. And they were hauling a long load of freight-cars? A. Yes, sir.

Q. About how many freight-cars?

A. Well, I think there were about seventy.

Q. About seventy freight-cars? A. Yes, sir.

Q. And did you see any fire at Badger when you went through? A. No, sir.

Q. And then when you got through—got over—let me see. You got to Vista, didn't you?

A. Yes, sir.

Q. That is the next station beyond Badger on the way to Pasco? A. The second station.

Q. The second station? A. Yes, sir.

Q. Before you got to Vista did you look back and see an illumination on the sky? A. No, sir. [90—44]

Q. But when you got to Vista you did?

A. Yes, sir.

Q. And you said to the engineer, "It looks like the whole town of Badger is afire," did you not?

A. Yes, sir.

Q. And how much of a run is it from Badger to Vista?

A. Well, it is about fifteen or twenty minutes, something like that.

Mr. GRAHAM.—That is all.

(Testimony of Hugh Palmer.)

Cross-examination.

(By Mr. WINDERS.)

Q. Now, Mr. Palmer, you had been on this engine 1618 for a long time, hadn't you?

A. Yes, sir.

Q. How long have you been in the railroad service? A. About eighteen years and a half.

Q. How long have you been on the Pasco Division? A. All of that time.

Q. The Pasco Division starts at Ellensburg and goes to Pasco?

A. At Ellensburg and goes through Pasco to Spokane.

Q. And you had been working on this helper engine 1618 for some time? A. Yes, sir.

Q. And you were working on this day in the regular course of your employment? A. Yes, sir.

Q. And where did you hook on to the helper engine? A. At Kiona. [91—45]

Q. That would be west, railroad man's direction, but north really—the real direction from Badger?

A. Yes, sir.

Q. Is there a grade between Kiona and Badger?

A. Yes, sir.

Mr. GRAHAM.—We object to that as irrelevant and immaterial and incompetent.

Mr. WINDERS.—You asked him about this helper engine.

Mr. GRAHAM.—That is not proper cross-examination.

(Testimony of Hugh Palmer.)

The COURT.—It is perhaps not proper cross-examination.

Mr. WINDERS.—I see.

Q. You had about seventy cars?

A. About seventy cars.

Q. You are familiar with the tonnage you had?

A. No, I don't remember—I don't remember—I don't know what tonnage we did have.

Q. Did you have an overload? A. No, sir.

Mr. GRAHAM.—I object to that.

Mr. WINDERS.—You asked him about the tonnage.

Mr. GRAHAM.—I did not ask him about the tonnage. I asked him how many freight-cars he had.

The COURT.—He has a right to find out whether they were loaded or empty on cross-examination.

Mr. GRAHAM.—Very well.

Q. You had an easy load, did you, Mr. Palmer?

A. Well, we were light that day.

Q. You were light? [92—46] A. Yes, sir.

Q. And then you went up to Vista?

A. Yes, sir.

Q. And got to Vista in fifteen or twenty minutes?

A. Yes, sir.

Q. You had to head into Vista to let No. 1, the North Coast passenger train, go by? A. Yes, sir.

Q. And you looked back and saw the illumination? A. Yes, sir.

Q. Was there anything in connection with your operation through Badger or the operation of this

(Testimony of Hugh Palmer.)

train or the operation of this engine or the other engine in your opinion that could have had anything to do with this fire?

A. Nothing whatever.

Q. Operating it in the same way as you had been operating it? A. Yes, sir.

Q. A capable engineer? A. Yes, sir.

Q. You had been on the run for a long while?

A. Yes, sir.

Mr. WINDERS.—That is all.

Mr. GRAHAM.—That is all.

(Witness excused.) [93—47]

TESTIMONY OF BEN AGOR, FOR PLAINTIFF.

BEN AGOR, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination.

(By Mr. GRAHAM.)

Q. State your full name, please.

A. Ben Agor.

Q. Where do you live? A. Yakima.

Q. What is your occupation?

A. Raising of sheep.

Q. You are a son of Peter Agor, aren't you?

A. I am.

Q. You—and who owned the wool that was destroyed in the warehouse at Badger on May 2d, 1926? A. Peter Agor.

(Testimony of Ben Agor.)

Q. You have the active management and control of the sheep business for your father, haven't you?

A. Yes, sir.

Q. How long have you been in the sheep business? A. All my life.

Q. Where was your 1925 and 1926 clip of wool kept? A. In the warehouse at Badger.

Q. You have two sheep ranges, haven't you?

A. Two sheep ranges.

Q. Where are they

A. One is in Benton County and one is in Kittitas County.

Q. And the two years' clip was in the warehouse at Badger at the time of the fire?

A. Yes, sir. [94—48]

Q. Under what arrangement was this wool kept in the warehouse there?

A. Just what was that?

Q. Under what arrangement was the wool stored in the warehouse?

A. I don't understand that question.

Mr. WINDERS.—I think he means did you have a lease or where did you get your right to put it there.

Q. Where did you get your right to put it there?

A. We got the right from Saddler Bros. at Kiona to use the warehouse for storage.

Q. And did you pay them storage for the use of this warehouse for wool? A. Yes, sir.

Q. Just describe this warehouse, Mr. Agor. You

(Testimony of Ben Agor.)

have been in Badger many times and you are familiar with the warehouse, aren't you?

A. Yes, sir.

Q. About what size was it, approximately?

A. Possibly fifty feet wide and two hundred feet long.

Q. That is approximately?

A. Approximately. I never measured it.

Q. And how was it situated in relation to the railroad track?

A. Well, I imagine it was about forty or fifty feet east of the main line.

The COURT.—You have that accurately, I presume, on the map.

Mr. GRAHAM.—Well, that was approximate also.

The COURT.—There is no use taking time for that. [95—49]

Mr. GRAHAM.—Very well, if the Court please.

Q. Was it kept locked at all times?

A. As far as I know.

Q. In that locality are there accumulations of dry weeds and other combustible material blowing around during a dry wind?

A. I have seen tumbleweeds and I have seen some papers around about the warehouse.

Q. Is the warehouse on the ground or off of the ground?

A. I imagine it is about three or four feet off of the ground.

(Testimony of Ben Agor.)

Q. And is the opening—below the floor of the warehouse is it open or is it boarded up?

A. It is open.

Q. It is open? A. Yes, sir.

Q. Is there a grade between Kiona and Badger?

A. Yes, sir.

Q. In what way do the engines act pulling up this grade, have you observed—how do they behave with reference to laboring?

A. They labor very hard at times with a heavy load.

Q. And what is done by the railroad company at times to avoid this extra laboring on the grade —on the up grade?

A. I have noticed that sometimes they split the train.

Q. Yes.

A. Leave it halfway—about halfway between Kiona and Badger.

Q. Now, what kind of a roof has this warehouse —had this warehouse? [96—50]

A. A shingle roof, if I remember right.

Q. Was it a flat or a steep—a sloping roof?

A. A sloping roof.

Q. Was it a steep slope

A. Well, about an average slope that you see on a house.

Q. About an average slope? A. Yes.

Q. When did you see the scene of the fire?

A. What is that?

(Testimony of Ben Agor.)

Q. After the fire started when did you first see it?

A. I saw it on Monday morning about 10:00 or 10:30.

Q. You were in Yakima at the time that the fire started? A. Yes, sir.

Q. Was it still burning at that time when you saw it? A. Still smoldering.

A. How much wool was in the warehouse at the time of the fire? A. 70,000 pounds.

Q. Are you familiar with the market price of your wool? Does the nature of your business require you to keep posted on the market price of wool? A. It does.

Q. Was that the time of the year when sales of wool take place? A. It was.

Q. Do you know the market price of wool in your vicinity—in that vicinity, on or about May 2d, 1926? A. I think I do.

Q. What grade or quality was this wool that was stored in the warehouse? [97—51]

A. Well, the grade was a medium type of wool.

Q. When was it sheared?

A. It was shorn some time between the 15th and the 20th of March, if I remember right.

Q. Of both years?

A. Of both years, yes, sir.

Q. And how was it with reference to dirt content?

A. Well, it was cleaner than the average wool

(Testimony of Ben Agor.)

shorn in that country on account of being shorn earlier.

Q. And what was the market price of this wool at the time of the fire?

A. Well, wool had been selling from twenty-eight to thirty-two cents a pound that particular year and we figured a value on that wool of thirty cents.

Q. Do you think that you could have sold the wool had the fire not occurred for that amount at that time? A. Yes, sir, we could have.

Q. Do you know of other sales that took place about that time of wool in that vicinity?

A. Right at that time I cannot say as to sales in that vicinity, as this wool was shorn about twenty days sooner than the other wool was shorn.

Q. Was the market stable or fluctuating during all that time?

A. No, the market was steady.

Q. And how soon do you know of another sale in that vicinity? How close to May 2d were there any other sales, if you know, of any other dealer?

A. Well, there was a sale in Yakima—wool that we financed of other concerns. We sold their wool for either thirty-one [98—52] and a half or thirty-two cents a pound.

Q. When was that? A. Around May 1st.

Q. Around May 1st? A. Yes, sir.

Q. And what was the grade of that wool with reference to this? A. About the same grade.

Q. Yes.

(Testimony of Ben Agor.)

A. Possibly a little lighter in shrinkage but very little difference; the dirt content was about the same.

Q. Did you sell your Kittitas wool about that time? A. A little after.

Mr. WINDERS.—It seems to me that he is unnecessarily encumbering the record. He has testified—the witness—what in his opinion the market value was. Now I might want to cross-examine him and I submit that the questions that he is asking now are cross-examination of his own witness.

Mr. GRAHAM.—Will you admit that the market value was thirty cents a pound?

Mr. WINDERS.—I do not admit that it was thirty cents. I am not going to offer any evidence. I think Mr. Agor is a perfectly honorable man and I am not going to offer any evidence against him on that price. But I am not admitting that it was thirty cents.

Q. Was the wool insured against fire?

A. It was.

Q. With whom?

A. With the General Insurance Company. [99—53]

Q. With the General Insurance Company of America? A. Of America, yes, sir.

Q. Did the General Insurance Company of America pay to you the market value of this wool?

A. It did.

(Testimony of Ben Agor.)

Mr. WINDERS.—I object, if your Honor please, however I have no objection to him stating how much they paid. I do not think there is any dispute about it.

The COURT.—State the amount.

A. Offhand I cannot say.

Q. Well, handing you Plaintiff's Exhibit for identification—

The COURT.—(Interrupting.) Hand him the check.

Mr. GRAHAM.—I beg your pardon?

The COURT.—Hand him the check and let him refresh his memory.

Q. I show you Plaintiff's Identification No. 1. State the amount after refreshing your recollection from the check. A. $20,481.90.

Q. Was that the amount?

A. That was the amount.

Q. Are you familiar with your father's signature? A. I am.

Q. Is that his indorsement on the back of that check? A. It looks like it.

Q. You know for a fact that that money was received? A. Yes, sir.

Q. Handing you Plaintiff's Exhibits 2 and 3 for identification, examine those. Are those your father's signature on the bottom of those papers?

A. They are. [100—54]

Mr. GRAHAM.—I offer these three exhibits in evidence, if the Court please.

Mr. WINDERS.—No objection.

(Testimony of Ben Agor.)

The COURT.—They may go in.

(Whereupon documents marked for identification Plaintiff's Exhibits 1, 2, and 3 were admitted in evidence as Plaintiff's Exhibits 1, 2, and 3, respectively.)

Mr. GRAHAM.—That is all.

Cross-examination.

(By Mr. WINDERS.)

Q. Mr. Agor, you have been familiar with this country for a good many years? A. I have.

Q. You and your father? A. Yes, sir.

Q. Have been quite extensively engaged in the sheep business? A. Yes, sir.

Q. And still are? A. Yes, sir.

Q. And intend to be? A. Yes, sir.

Q. Did you intend to leave any impression with this jury that there was any blowing of weeds or thistles around this warehouse or under this warehouse at the time of this fire?

A. Well, what I have noticed during a hard wind there—I have noticed thistles blowing across the right of way at times. [101—55]

Q. You are not testifying that there were any thistles blowing at the time of the fire, are you?

A. Well, I was not there at the time of the fire; no.

Q. As a matter of fact, they have some pretty severe winds around there, don't they?

A. They do.

Q. And the ground is practically sand and sagebrush right around the station?

(Testimony of Ben Agor.)

A. And bunch grass.

Q. And bunch grass. A. Yes, sir.

Q. You got over there the next morning after the fire? A. I did; yes, sir.

Q. And you talked to Fernandes, your foreman? A. At times; yes, sir.

Q. You don't know how this fire started, do you, Mr. Agor? A. No, I don't.

Q. Mr. Fernandes told you that he didn't know how it started? A. Yes, sir.

Q. You had in your warehouse, Mr. Agor, both your '25 and your '26 crops A. Yes, sir.

Q. And your best judgment is that there were 70,000 pounds? A. Which?

Q. And your best judgment is that there were 70,000 pounds of the two crops? A. Yes, sir.

Mr. WINDERS.—I think that is all.

Mr. GRAHAM.—That is all.

(Witness excused.) [102—56]

TESTIMONY OF R. W. DENT, FOR PLAINTIFF.

R. W. DENT, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. GRAHAM.)

Q. What is your name? A. R. W. Dent.

Q. Where do you live, Mr. Dent? A. Yakima.

Q. What is your business? A. Insurance.

(Testimony of R. W. Dent.)

Q. Are you the agent for the General Insurance Company of America in Yakima? A. Yes, sir.

Mr. GRAHAM.—Mark these for identification.

(Documents marked 4 and 5 for identification.)

Q. Did you visit the scene of this fire?

A. Yes.

Q. When, for the first time?

A. The next morning after the fire.

Q. About what time?

A. About 10:00 or 10:30.

Q. Was the fire still burning then?

A. Well, there were hot coals and ashes—yes.

Q. Well, it was still burning at that time, wasn't it? A. Oh, yes.

Q. It had not died down? A. No.

Q. And did you talk to the section foreman at that time? [103—57] A. Yes.

Q. What is his name?

A. I cannot call his name now. I cannot pronounce it.

Q. It is a Greek name? A. Yes, sir.

Q. Saligandus? A. That is it.

Q. And did he tell you when he first saw the fire?

Mr. WINDERS.—I object, if your Honor please, to that as hearsay. They have subpoenaed him. Saligandus is here. He was served with a subpoena from the Insurance Company.

Mr. GRAHAM.—We have not been able to talk to him. They would not allow us to ask him a question.

(Testimony of R. W. Dent.)

Mr. WINDERS.—Oh, no. You wanted to come down to our office and—

The COURT.—(Interrupting.) He can answer this question whether he talked to him.

Mr. GRAHAM.—I beg your pardon?

The COURT.—He can answer this question whether he talked to him. Whether he can tell what he said is another matter. Did he talk to you?

The WITNESS.—Yes, sir.

Q. And did he tell you how and when he first saw this fire? A. Yes, sir.

Q. Now, when did he tell you?

Mr. WINDERS.—I object to that, if your Honor please, trying to impeach somebody that they have not put on the witness-stand.

Mr. GRAHAM.—No, we are not trying to impeach anybody. [104—58] That is part of the *res gestae*—

Mr. WINDERS.—(Interrupting.) It is hearsay evidence and it is incompetent, irrelevant and immaterial.

Mr. GRAHAM.—The fire was still burning. It is part of the *res gestae.*

Mr. WINDERS.—You asked him how it started.

The COURT.—I will have to be shown. I do not think it is part of the *res gestae.* A statement made the next morning would not be *res gestae.*

Mr. GRAHAM.—The fire burned all night, if the Court please, and was still burning when he came on the scene.

(Testimony of R. W. Dent.)

The COURT.—Objection sustained.

Mr. GRAHAM.—Exception.

Q. Handing you Plaintiff's Exhibits 4 and 5 for identification, are those the copies of the policies of insurance that were issued to cover this wool?

A. Yes, sir.

Mr. GRAHAM.—I offer these in evidence.

Mr. WINDERS.—You do not expect me to read all these policies, do you?

Mr. GRAHAM.—No.

Mr. WINDERS.—I haven't any objection. They are the ordinary policies, are they?

The WITNESS.—The standard form except that we make our own form on the front covering the wool. The rest of the policy is the same.

Mr. WINDERS.—We have no objection.

The COURT.—They may be admitted.

(Whereupon policies of insurance were admitted in evidence as Plaintiff's Exhibits 4 and 5, respectively.) [105—59]

Mr. GRAHAM.—That is all.

Mr. WINDERS.—I have no questions.

(Witness excused.)

Mr. GRAHAM.—The plaintiff rests.

(Plaintiff rests.)

Mr. WINDERS.—At this time, if your Honor please, I want to interpose a motion for judgment of nonsuit. We have been here for a week in this case but I can see nothing that has been offered in evidence that calls for any answer on the part

of the railroad company. I understand that there are cases where a fire has started along the railroad right of way, where there was some evidence in connection with defective equipment or negligent operation, that would make a case, but I never apprehended nor do I now apprehend that there is any case in the books that holds that simply because the train goes by there about ten minutes before the fire and the fire breaks out in the warehouse ten minutes afterwards, that there is a case made of negligence against the railroad company.

The COURT.—I will excuse the jury until 2:00 o'clock.

(Jury was thereupon excused and argument was had by respective counsel on the motion.)

The COURT.—A good many years ago I tried a case in this court as one of the attorneys for the plaintiff to recover for the loss of a shingle-mill. We showed in that case [106—60] that the freight train that ran by this shingle-mill emitted sparks—large sparks. We also showed that surrounding this mill there was a great deal of inflammable material. Cedar—dry cedar. Within half an hour after the train—half an hour or such a matter, or possibly a little longer than that, the fire was discovered and the shingle-mill was destroyed. It was shown in the testimony that the mill was in operation at the time and employed some fifteen or twenty men, and a nonsuit was granted in that case by Judge Hanford. I always thought that he was wrong and I still think so, because I

think from what we showed in that case, the inflammable material surrounding and likewise the emitting of sparks from that same engine created a condition from which a reasonable inference could be drawn that the fire was occasioned by defective appliances.

While occupying the state court bench in Whatcom County about twenty-three or twenty-four years ago a case was presented of a logging engine setting fire to what was practically timber. In that case it was shown that along the railroad right of way and where the fire started there was inflammable material, and it was likewise shown in that case that the particular engine that was operated emitted sparks—large sparks. It was shown that upon this same engine fires had been started, and the testimony further showed—I thought it went further than was necessary—that there was a defect in the spark-arrester, and the meshes in the screen were likewise not of the latest approved pattern, and the court denied a nonsuit and denied a directed verdict. [107—61]

I confess in this case there is not any theory of the law that I can conceive of upon which I could tell the jury to predicate a verdict based upon facts, or a reasonable inference. There is no evidence that anyone ever saw any sparks emitted from this engine, and the only evidence with relation to sparks is that the first witness at one time saw some sparks emitted from an engine that was laboring and going up this grade with a train of cars. And there is an absence of any evidence as to any inflammable

material either on the railroad track or between the railroad track and this warehouse or under the warehouse anywhere, and the further testimony is that at the time this particular train came to the station on the east, that the engineer looked back and saw the fire and remarked that it looked as though the whole town of Badger was aflame.

Now, for the Court to submit to the jury the question of fact as to whether a spark emitted from an engine in ten or fifteen or twenty-five minutes could create a flame that would cast such a reflection as to inspire the thought of this fireman, burning a wooden warehouse set on piles three and a half or four feet from the ground, and then the evidence shows that at ten o'clock, shortly after the train went by the fire was contained within the scope disclosed by the witness—I cannot conceive how I can do that.

I am very loath always to grant nonsuits. I rarely do it, but when there is an absence of facts—Now then, the statement of Mr. Howe. The fact that the fire in the engine was the only fire disclosed by the [108—62] evidence, I do not think that that could possibly be—supposing no evidence was presented, the Court could not possibly let a verdict stand upon the mere fact that an engine with fire in it passed a warehouse fifty feet away and the warehouse was aflame half an hour afterwards and the light created the impression upon the fireman as disclosed here.

I think the motion must be granted, and that will be the order.

Mr. GRAHAM.—Exception, if the Court please.

The COURT.—Note an exception to that. [109—63]

ORDER SETTLING BILL OF EXCEPTIONS.

The within and foregoing bill of exceptions coming on this day for settlement, both parties being present by their respective counsel, there being no amendments proposed—

IT IS HEREBY ORDERED that the within and foregoing bill of exceptions is hereby settled.

Done in open court this 23d day of January, 1928.

JEREMIAH NETERER,
District Judge.

Service of attached bill of exceptions proposed by plaintiff admitted by receipt of copy thereof this 12 day of November, 1927.

GEO. T. REID,
C. H. WINDERS,
Attorneys for Defendant.

[Endorsed]: Filed Jan. 23, 1928. [110]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL.

To the Clerk of the United States District Court for the Western District of Washington, Northern Division:

You will kindly prepare and certify the record on

appeal prosecuted by the above-named defendant, consisting of the following papers and records, to wit:

1. Summons with return of service thereon.
2. Amended complaint.
3. Answer.
4. Stipulation.
5. Order allowing filing of amended complaint.
6. Clerk's minute entry of trial proceedings on November 4, 1927.
7. Judgment.
8. Defendant's statement of costs and disbursements.
9. Petition for new trial.
10. Objections of plaintiff to defendant's statement of costs and disbursements. [111]
11. Affidavit of C. H. Winders in support of cost bill.
12. Order denying petition for new trial.
13. Order on appeal from decision of Clerk *in re* taxation of costs.
14. Bill of exceptions.
15. Assignment of errors.
16. Notice of appeal.
17. Bond on appeal.
18. Citation on appeal.
19. Clerk's minute entries as to taxation of costs.
20. This praecipe.

HOWE & GRAHAM,
Attorneys for Plaintiff.

Service of the above and foregoing praecipe acknowledged by receipt of copy thereof, this 20th day of April, 1928.

C. H. WINDERS,
Attorney for Defendant.

[Endorsed]: Filed Apr. 20, 1928. [112]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 112, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true, and correct statement of all expenses, costs, fees

and charges incurred and paid in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [113]

Clerk's Fees (Act of Feb. 11, 1925) for making record, certificate or return, 271 folios at 15¢ $40.65

Certificate of Clerk to Transcript of Record with seal ..... .50

Total $41.15

I hereby certify that the above cost for preparing and certifying record, amounting to $41.15, has been paid to me by the attorneys for appellant.

I further certify that I hereto attach and herewith transmit the original citation issued in the cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court at Seattle, in said District, this 30th day of April, 1928.

[Seal]

ED. M. LAKIN,
Clerk United States District Court, Western District of Washington.

By S. E. Leitch,
Deputy. [114]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,—ss.

To Northern Pacific Railway Company, a Corporation, C. H. Winders, Its Attorney, GREETINGS:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, notice of appeal having heretofore been served upon you, said appeal being from a final judgment signed, filed and entered on the 4th day of November, 1927, in that certain suit, being cause No. 11162, wherein General Insurance Company of America, a corporation, is plaintiff, and you are defendant and appellee, to show cause, if any there be, why the judgment of nonsuit and dismissal rendered against said plaintiff and appellant should not be corrected, and why justice should not be done to the parties in that behalf. [115]

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 13th day of April, A. D. 1928.

[Seal] JEREMIAH NETERER,
United States District Judge.

Received a copy of the foregoing this 13 day of Apr., 1928.

C. H. WINDERS,
Attorney for Defendant.

[Endorsed]: Filed Apr. 13, 1928. [116]

[Endorsed]: No. 5484. United States Circuit Court of Appeals for the Ninth Circuit. General Insurance Company of America, a Corporation, Appellant, vs. Northern Pacific Railway Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed May 3, 1928.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

[Endorsed]: Printed Transcript of Record. Filed May 17, 1928. Paul P. O'Brien, Clerk.

No. 5484

United States
Circuit Court of Appeals
For the Ninth Circuit.

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,

Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

At a stated term, to wit, the September Term, A. D. 1928, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the courtroom, in the City of Seattle, in the State of Washington, on Monday, the seventeenth day of September, in the year of our Lord one thousand nine hundred twenty-eight. Present: Honorable FRANK H. RUDKIN, Circuit Judge, Presiding; Honorable FRANK S. DIETRICH, Circuit Judge; Honorable WILLIAM H. HUNT, Circuit Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED above cause argued by Mr. Donald G. Graham, counsel for the appellant, and by Mr. Arthur E. Simon, counsel for the appellee, and submitted to the Court for consideration and decision.

At a stated term, to wit, the October Term, A. D. 1928, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fifteenth day of October, in the year of our Lord one thousand nine hundred and twenty-eight. Present: Honorable WILLIAM B. GILBERT, Senior Circuit Judge, Presid-

ing; Honorable FRANK H. RUDKIN, Circuit Judge; Honorable FRANK S. DIETRICH, Circuit Judge.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF DECREE.

By direction of the Honorable Frank H. Rudkin, Frank S. Dietrich and William H. Hunt, Circuit Judges, before whom the cause was heard, ORDERED that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk and that a decree be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION U. S. CIRCUIT COURT OF APPEALS.

Before RUDKIN, DIETRICH and HUNT, Circuit Judges.

HUNT, Circuit Judge.—The plaintiff insurance company seeks reversal of a judgment rendered against it following a motion for a nonsuit in an action to recover from the railroad company damages by reason of a fire alleged to have been caused by sparks from defendant's locomotive, alleged to have been negligently constructed and operated.

The insurance company had issued two policies of fire insurance to one Agor, covering wool and sacks while contained in a warehouse at Badger, Washington. On May 2, 1926, at about 9:50 or 10 o'clock P. M., the warehouse and its contents were destroyed by fire. The complaint alleged that the fire was negligently started by sparks or cinders and that the locomotive was so negligently constructed and operated as to permit and cause sparks, cinders and live coals to escape and to start a fire which spread to the wool and sacks stored in the warehouse. The insurance company paid the loss, and under claim of subrogation to Agor's rights, instituted this action. Defendant admitted that the property was destroyed by fire but denied the allegations of negligence. At the conclusion of plaintiff's testimony, judgment in favor of the railroad company was ordered. The insurance company appealed.

At Badger the railroad tracks run in a northerly and southerly direction. There is neither agent nor telegraph operator at the place. The burned warehouse in which the wool was stored was built from three to four feet above the ground and was open from the bottom to the ground. It had a shingle roof and was between thirty-five and forty feet in length, situated east of the main line track. A wagon road runs alongside the building. Between the main line and the warehouse there were a passing track and a spur which served the warehouse. On the west side of the main line track were a railroad tool-house and an abandoned gas storage

tank. As the railroad approaches Badger there is a heavy uphill grade. During the day of the fire the wind had been blowing from the west. About 9:45 P. M. a freight train consisting of seventy cars and two engines came up grade toward Badger, and passed the warehouse. About 10 o'clock Fernandez, a sheep-herder, who lived in a shack about 150 yards south of the warehouse and on the same side of the track, saw the warehouse on fire on the south or southwest side, which was the corner nearest the railroad tracks. He testified that the fire appeared to have started from the ground and that it was burning toward the roof, and quickly consumed the whole building. He stated that at previous times he had seen Russian thistles in the vicinity and that when the wind blew he had seen them blowing; that on some previous occasions he had seen much smoke and sparks coming from locomotives as they came up toward Badger; that he went to bed on the evening of the fire about 7:30 or 8 o'clock, and did not see any smoke or sparks on the night of the fire; that there were only three men at the station on the day of the fire; that the section foreman had a cabin north of the warehouse and that another employee of the railroad lived in a cabin west and nearly opposite the warehouse. To the south of the warehouse there was an abandond cistern and an ice-house a distance of about 450 feet from the cabin of the section foreman. Fernandez testified that there were some sheep men with their herds in the vicinity of Badger and that about the date of the fire there

had been some trouble between Fernandez and another sheep man; that on the afternoon of the day of the fire Fernandez asked the section foreman and his helper to go with him into the hills and drive some sheep which belonged to another man away from the Agor range; that when they reached the place where the sheep were they found a boy in charge and told him to tell his father to keep off of Agor's range. Witness testified that the warehouse was generally kept locked and that usually the key was left either in the door or in a hole in the floor by the door; that if anyone reached into the hole he could find the key; that there had been some sheep shearers at Badger some ten days prior to the fire and that they had slept in the warehouse. It appeared also that in the debris after the fire some cooking utensils were found. The fireman of the helper engine which pulled the freight train up to and through Badger testified that when the train went through Badger he saw no fire, but that when he reached Vista, a run of fifteen or twenty minutes from Badger, he looked back and remarked to the engineer that it looked as if the whole town of Badger was afire; that in his opinion there was nothing in connection with the operation of the engines which could have had anything to do with the fire. There was no testimony as to what fuel was used on the locomotive; of what, if any, equipment was used to prevent the emission of sparks, or what, if any, methods of operation were employed to prevent the escape of sparks or cinders.

The action is based upon negligence arising out of construction and operation of defendant's locomotive, and as no person saw fire directly communicated to the warehouse, the plaintiff was obliged to make proof of communication of the spark or fire by circumstances sufficient to uphold a finding that the fire was set by a spark from the locomotive of the defendant company.

Two locomotives were pulling the long train up a stiff grade upon which, at other times, engines had been seen to emit a great deal of smoke and some sparks; the country was dry and there were tumbleweeds and thistles in the vicinity of the warehouse; there was no fire in any building near the warehouse; only three persons lived anywhere near the warehouse; no one was seen in the vicinity of the building that day; no one had slept in the building for ten days or more prior to the fire; there was no fire when the train passed, but some fifteen minutes later the building was a mass of flames, seen by the fireman of the train when it reached Vista. When first seen by the sheep-herder, the fire appeared to have started on the side or corner nearest the tracks and to be burning from the ground up. It is the opinion of a majority of the Court that although the question is not free from doubt, there were facts and circumstances sufficient to call for submission to the jury.

But however that may be, we are of one mind in deciding the question whether proof that sparks or cinders from the locomotives hauling the train set the building on fire raised the presumption that

there was negligent construction or operation of the locomotive or locomotives from which the sparks or cinders were emitted. We are referred to decisions which hold that where the circumstances lead to the conclusion that the origin of the fire was from a locomotive, there is a *prima facie* case and the burden of showing that there was no negligence in construction or operation of the locomotive is upon the railroad company. The Supreme Court of Washington seems to have accepted that view. (Thorgrimson vs. Northern Pacific Ry., 64 Wash. 500; Shearman & Redfield on Negligence, sec. 675 et seq.; Elliott on Railroads, sec. 1766.) But in the better considered cases in the federal courts it is held that the question is one of general law and that it cannot be said that the mere ignition by sparks is *prima facie* evidence of negligence of the railroad company. Such was the opinion expressed by Judge Taft for the Court of Appeals of the Sixth Circuit in Garrett vs. Southern Ry., 101 Fed. 102, a case quite like the one at bar, where the Court, after recognizing that there is contrariety of decision, cited the Nitroglycerin Case, 15 Wall. 524, and invoked the principle that one who charges negligence must prove it by showing that defendant, by his act or by his omission, has violated some duty incumbent upon him which has caused the injury complained of.

Again, in Toledo St. Louis & W. R. Co. vs. Star Flouring Mills, 146 Fed. 953, the Court of Appeals, speaking through Judge Lurton, after citing decisions presenting the conflict upon the question

whether evidence that a fire was started by escaping sparks constitutes, without more, a *prima facie* case of negligence, affirmed Garrett vs. Southern Ry., *supra*. The Court held that the more logical view is that the gravamen of an action for loss of property by fire communicated by sparks is negligence, and that "inasmuch as a railway company may lawfully use locomotives, it cannot be made liable for a loss from sparks emitted unless plaintiff shows such sparks to have been negligently emitted," and that the burden of showing negligence is upon him who affirms it. See, also, Cincinnati etc. Co. vs. South Fork Coal Company (CCA. 6), 139 Fed. 528; Louisville & Nashville R. Co. vs. Bell (CCA. 6), 206 Fed. 395. We agree with the general doctrine of the federal cases cited. Slight evidence may be sufficient to show negligence, but where, as here, there is really nothing beyond the fact that the building was burned by sparks which, by common knowledge, must to some extent escape from a locomotive hauling a train, there is no evidence which calls for rebuttal.

The judgment is affirmed.

[Endorsed]: Opinion. Filed Oct. 15, 1928. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 5484.

GENERAL INSURANCE COMPANY OF AMERICA, a Corporation,

Appellant,

vs.

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,

Appellee.

DECREE U. S. CIRCUIT COURT OF APPEALS.

Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Washington, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed, with costs in favor of the appellee and against the appellant.

It is further ordered, adjudged and decreed by this Court, that the appellee recover against the appellant for its costs herein expended, and have execution therefor.

[Endorsed]: Decree. Filed and entered Oct. 15, 1928. Paul P. O'Brien, Clerk.

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and twenty-one (121) pages, numbered from and including 1 to and including 121, to be a full, true and correct copy of the entire record, excluding original exhibits of the above-entitled cause in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 22nd day of December, A. D. 1928.

[Seal] PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 25, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.